No. 52.

Brief of Atty. Gen. (Richards) for

Filed Apr. 7, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
THE OREGON AND CALIFORNIA RAILROAD Company, John A. Hurlbert, and Thomas L. Adams, appellees. } No. 52.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

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STATEMENT OF THE CASE.

The question involved is the right of the United States to certain lands near Portland, Oregon, granted to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stats., 365), and forfeited, for failure to construct the road, to the Government by the act of September 29, 1890 (26 Stats., 496), in view of the junior overlapping grant to the Oregon and California Railroad Company by the act of July 25, 1866 (14 Stats., 239), under which that road was constructed and the lands patented to it.

PROCEEDINGS.

The original suit was brought by direction of Attorney-General Miller in the United States circuit court for the district of Oregon to cancel the patents and restore the lands to the public domain. The lands involved amount to about 218,000 acres. The bill of complaint (Record, pp. 1 to 17), as amended (Record, p. 20), was demurred to. On this demurrer Judge Gilbert found in favor of the Government (Opinion, Record, pp. 22 to 29).

Afterwards an answer was filed by the railroad company (Record, pp. 33 to 50), a replication by the Government (Record, p. 50), testimony was taken, and Judge Gilbert rendered judgment in favor of the Government on the merits (Opinion, Record, pp. 63 to 65).

From the decree an appeal was taken by the railroad company to the circuit court of appeals, which, in an opinion by Judge Ross, Judge Hawley concurring, reversed the judgment of the circuit court and remanded the case with directions to dismiss the bill (Record, pp. 168 to 175). From this decision Mr. Justice McKenna, then circuit judge, dissented (Opinion, Record, pp. 176 to 183).

From the judgment of the circuit court of appeals the United States appealed to this court. The assignment of errors is printed in the Record, pages 184 to 187.

THE GRANT OF JULY 2, 1864, TO THE NORTHERN PACIFIC (13 STATS., 365).

The first section of this act creates the Northern Pacific Railroad Company and authorizes it to construct and

maintain "a continuous railroad and telegraph line, with the appurtenances, namely,"

> Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly *by the most eligible railroad route, as shall be determined by said company*, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, *with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon*, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.

The second section contains the grant of right of way and material for construction:

> SEC. 2. That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, *adjacent to the line of said road*, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in *width on each side of said railroad* where it may pass through the public domain, including, etc., etc.

The third section contains the land grant:

> SEC. 3. *And be it further enacted*, That there be, *and hereby is, granted* to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure

the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, *every alternate section of public land*, not mineral, designated by odd numbers, *to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories* of the United States, *and ten alternate sections of land per mile* on each side of said railroad whenever it passes *through any State*, and whenever on the line thereof, the United States have full title, *not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;* and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided further*, That all mineral lands be, and the same are

hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

The fourth section provides for the patents:

SEC. 4. *And be it further enacted*, That whenever said "Northern Pacific Railroad Company" shall have twenty-five consecutive miles *of any portion of said railroad and telegraph line* ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, *and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road;* and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: *Provided*, That not more than ten sections of land per mile, as said

road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided also*, That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

The sixth section provides for withdrawals.

SEC. 6. *And be it further enacted*, That the President of the United States shall *cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed*, and as fast as may be required by the construction of said railroad; and the odd sections of land *hereby granted* shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, *excepting those hereby granted to said company*. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale.

* * * * *

SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific

Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

SEC. 9. *And be it further enacted*, That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upward of one year, then, in such case, at any time hereafter, the United States, by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

THE PERHAM MAP, FILED MARCH 6, 1865.

On March 6, 1865, Josiah Perham, president of the Northern Pacific, addressed the Secretary of the Interior a communication saying (Record, p. 81):

> Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink *the general line of their railroad* from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, *via the Columbia River*, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the Gen-

> eral Land Office, together with a copy of the charter and organization of said company, and that under your directions *the lands granted to said company may be marked and withdrawn* from sale in conformity to law.

The map referred to appears in the Record, page 164, original 336.

From Wallula west the line or lines indicated on the map form a triangular loop. There is a line from Wallula northwesterly across the Cascades to Puget Sound; a line via the valley of the Columbia, on the north side of the river, westerly to a point opposite Portland; and a line from the point on the Columbia opposite Portland northerly or northeasterly to a point on Puget Sound. There is no indication on the map as to which of these lines is the "main" and which the "branch" line.

On March 9, 1865, J. P. Usher, then Secretary of the Interior, transmitted this map to the Commissioner of the General Land Office by a letter (Record, p. 82) in which he recommends the withdrawal requested by Mr. Perham.

On June 22, 1865, the Acting Commissioner of the General Land Office, Mr. Wilson, declined to order the requested withdrawal, holding (Record, p. 83):

> The evidence required of the route under the established ruling of the Department is a connected map showing the exact location, the map indicating by flagstaffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee. That proof is required to show the precise portions of each section or smallest legal subdivisions cut by the route.

THE JOINT RESOLUTION OF APRIL 10, 1869 (16 STATS., 57).

On April 10, 1869, Congress passed a joint resolution granting a right of way for the construction of a railroad from a point at or near Portland, Oreg., to a point west of the Cascade Mountains, in Washington Territory, the resolution providing (16 Stats., p. 57):

> *Be it resolved, etc.*, That the Northern Pacific Railroad Company be, and hereby is, authorized *to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound*, to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof: *Provided*, That said company shall not be entitled to any subsidy in money, bonds, *or additional lands* of the United States, in *respect to said extension of its branch line* as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: *And provided further*, That at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter until the whole of said extension shall be completed.
>
> Approved, April 10, 1869.

No action was taken by the company under this resolution, because it did not contain any grant of lands to aid in the construction of the proposed extension from Portland to Puget Sound.

THE JOINT RESOLUTION OF MAY 31, 1870 (16 STATS., 378).

On May 31, 1870, Congress adopted the following joint resolution (16 Stats., p. 378), "authorizing the Northern Pacific Railroad Company to *issue its bonds* for the construction of its road, and to secure the same by mortgage, and for other purposes:"

> That the Northern Pacific Railroad Company be, and hereby is, *authorized to issue its bonds* to aid in the construction and equipment of its road, and *to secure the same by mortgage* on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and *also to locate and construct*, under the provisions and *with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound;* and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen

hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July second, eighteen hundred and sixty-four. *And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon,* shall be completed by the first day of January, anno domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: *Provided*, That all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgage lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided, further*, That in the construction of the said railroad American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

SEC. 2. *And be it further resolved*, That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties.

THE MAP OF AUGUST 13, 1870.

On August 4, 1870, two maps of the Northern Pacific were presented to the Secretary of the Interior by the proper officers of the company, and on these withdrawals were made by the Secretary on August 13, 1870, and October 27, 1870. The lands involved in this suit are within these withdrawals. The maps, with accompanying letter, are printed in the Record, at page 164, marked (original) 333 and 334.

The certificates of Edwin T. Johnson, engineer in chief of the Northern Pacific, and that of J. Gregory Smith, president of the Northern Pacific, are to be found in the Record, pages 87, 90. The letter of Secretary Cox, of August 13, 1870, acknowledging the receipt of the two maps, is printed in the Record, pages 90, 91.

These two maps are referred to in the bill (Record, p. 3), as "maps of general route;" but in the amendment to the bill (Record, p. 20), after stating that no other maps of route or location were filed, and that two withdrawals were made upon these maps, the Government made the following reservation:

> Your orator nevertheless reserves to itself the right to insist, if it shall be so advised hereafter and herein, that said map of August 4, 1870, marked "Exhibit A," and said map of March 6, 1865, marked "Exhibit C," to the original bill were maps of definite location of said Northern Pacific Railroad of its line from Wallula Junction to Portland, Oregon.

Previous to the filing of these maps, namely, on February 17, 1870, J. Gregory Smith, president of the North-

ern Pacific, wrote Jay Cooke to confer with the Secretary of the Interior and urge the withdrawal of the lands in favor of the company and its grant. This letter, which was transmitted to the Secretary of the Interior, and Secretary Cox's reply of February 21, 1870, are printed in the Record, pages 85, 86.

FORFEITURE ACT, SEPTEMBER 29, 1890 (26 Stat., 496).

On September 29, 1890, Congress passed an act "to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and for other purposes," the material sections of which act are as follows (26 Stats., 496):

> *Be it enacted, etc.*, That there is hereby *forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted* to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad *not now completed*, and in operation, for the construction or benefit of which such lands were granted; and *all such lands are declared to be a part of the public domain: Provided*, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted.
>
> * * * * *
>
> SEC. 5. That if it shall be found that any lands *heretofore granted to the Northern Pacific Railroad Company, and so resumed by the United States and restored to the public domain*, lie north of the line known as the "Harrison line," being a line drawn from Wallula, Washington, easterly to the southeast corner of the northeast one-fourth of the southeast

quarter of section twenty-seven, in township seven north, of range thirty-seven east, of the Willamette meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July first, eighteen hundred and eighty-five, or who at said date were in possession of any portion of said lands or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved from the United States at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act, at the rate of two dollars and fifty cents per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: *Provided, That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York*, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located, according to the provisions of an act of the legislative assembly of the State of Oregon approved November twenty-fifth, eighteen hundred and eighty-five, providing for the means to supply the city of Portland with an abundance of good, pure, and wholesome water over and across the following-described tracts of land: Sections nineteen and thirty-one in township one south,

of range six east; sections twenty-five, thirty-one, thirty-three, and thirty-five, in township one south, of range five east; sections three and five in township two south, of range five east; section one in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five in township one south, of range four east, of the Willamette meridian, in the State of Oregon, *forfeited by this act, are hereby confirmed unto the said city of Portland*, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore-described strip of land, over and across the above-described sections for the purpose of constructing, maintaining, and repairing a water-pipe line aforesaid.

* * * * *

SEC. 6. That *no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation* to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation, or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared to the benefit of the completed line.

THE GRANT TO THE OREGON AND CALIFORNIA OF JULY 25, 1866 (14 STATS., 239).

The facts with respect to the grant to the Oregon and California Railroad, the definite location of its line, the withdrawals of land thereunder, the construction of the road, and the issuance of patents are undisputed, and are as follows:

By the act of July 25, 1866 (14 Stats., 239), Congress made a grant of lands to the Oregon and California Railroad Company to aid in the construction of a railroad and telegraph line "within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of Oregon," thence to connect with a proposed line of railroad in California, running from the State line to a point of connection with the Central Pacific Railroad in the Sacramento Valley.

The grant was made in the usual form and covered every alternate section of public land, not mineral, designated by odd sections, to the amount of ten sections per mile on either side of the line, reserving therefrom lands granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of, for which lands indemnity was to be allowed as provided in the act, the granting section reading as follows:

> SEC. 2. *And be it further enacted*, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of

the mails, troops, munitions of war, and public stores over the line of said railroad, *every alternate section of public land*, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and *when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands*, designated as aforesaid, *shall be selected* by said companies in lieu thereof under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections: and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior *a map of the survey of said railroad*, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That bona fide and actual settlers under the preemption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *And provided also*, That settlers

> under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

On October 29, 1869, under this act, the Oregon and California Railroad Company filed its map of "definite location" of its line from Portland south, showing a surveyed route for sixty miles and beyond the lands affected by this bill.

On this definite location, the usual withdrawals were made by the Secretary of the Interior on January 31, 1870, and carried into effect by the local officers on February 16, 1870. A portion of the road was thereupon constructed, and commissioners were appointed to examine and report thereon. On December 31, 1869, the commissioners reported that the road had been duly built for the first twenty miles south from Portland. On September 28, 1870, the commissioners reported the due construction of the next twenty miles. Both these reports were approved by the President, and patents for the land coterminous with the completed road were issued to the Oregon and California Railroad Company, of the dates of May 9, 1871; July 12, 1871; July 20, 1876, and July 18, 1877.

THE INDEMITY LANDS IN THE OVERLAP.

In the pleadings in the case a clear distinction does not seem to have been drawn relative to the locus of the lands in suit with regard to the granted or place limits,

and the secondary or idemnity limits of the grant made by the act of July 25, 1866, to the Oregon and California Road. An examination of the lands described in the bill of complaint in connection with the map or diagram showing the limits of the grant of said company (defendant's Exhibit Q, Record, original page 350, between pages 168 and 169 printed record), discloses that, beginning with the south half of section 35, township 5 south, range 3 east (near top page 12 of Record), all the remaining lands described in said bill are more than 20 miles distant from the line of said Oregon and California Road, and within the 30-mile or indemnity belt. These indemnity lands aggregate about 16,000 acres.

ARGUMENT.

I.

In construing public grants nothing can be taken against the Government by inference. What is not given expressly or by necessary implication is withheld.

In *Dubuque & Pacific Railroad Co.* v. *Litchfield* (23 Howard, 66), involving the validity of certain land grants, this court, speaking by Mr. Justice Catron, said (p. 88):

> All grants of this description are strictly construed *against* the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the

> statute; and if not thus expressed, they can not be implied. (*Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420.)

This language is quoted with approval by this court in *Leavenworth, etc., Railroad Co.* v. *United States* (92 U. S., 733), Mr. Justice Davis speaking for the court, adding (p. 740):

> And if rights claimed under the Government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not given expressly, or by necessary implication, is withheld.

In the *Delaware Railroad Tax Case* (18 Wall., 206) Mr. Justice Field thus states the general rule (p. 225):

> All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule.

II.

In construing a railroad land grant, the thing to be ascertained is the intent of Congress. The act is a law as well as a conveyance, and must be so construed as to carry out the legislative will.

In *Missouri, Kansas and Texas Railway Co.* v. *Kansas Pacific Railway Co.* (97 U. S., 491), there was involved a controversy between two railway companies in lands in Kansas claimed under their respective grants from the United States. Respecting the rule to be fol-

lowed in construing these grants, Mr. Justice Field, speaking for the court, said (p. 497):

> It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will.

In *United States* v. *Southern Pacific Railroad Co.* (146 U. S., 570), in which the land grants to the Southern Pacific and to the Atlantic and Pacific were before this court, the above language is quoted with approval (p. 598), preceded by the following by Mr. Justice Brewer (bottom p. 597):

> Illy as it may accord with the common-law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws as well as grants; that Congress intends no scramble between companies for the grasping of titles by priority of location; but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and therefore that in the eye of the law it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific.

So, in the comparatively recent case of *Wisconsin Central R. R. Co.* v. *Forsythe* (159 U. S., 46), the court, speaking by Mr. Justice Brewer, said (top p. 55):

> But it is a rule of equal if not higher significance that every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress, when ascertained, is to control in the interpretation of the law.
>
> The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together. (*Winona and St. Peter Railroad* v. *Barney*, 113 U. S., 618, 625; see also *Missouri, Kansas and Texas Railway* v. *Kansas Pacific Railway*, 97 U. S., 491, 497; *United States* v. *Southern Pacific Railroad*, 146 U. S., 570, 597; *United States* v. *Denver and Rio Grande Railway*, 150 U. S., 1.)

III.

The act of July 2, 1864, contains a land grant in aid of the branch line "via the valley of the Columbia River, to a point at or near Portland," which grant covers the lands in dispute. The word "branch" was descriptive only. The various grants in the act of 1864, of the right of way (sec. 2), of material (sec. 2), of land (sec. 3), apply to the entire line, branch as well as main line.

The first section of the act of July 2, 1864, authorizes the Northern Pacific Company to construct and maintain

"a continuous railroad and telegraph line with the appurtenances, namely." It then describes this "continuous line" as follows:

> Beginning at a point on Lake Superior, * * * thence westerly by the most eligible route, as shall be determined by said company, * * * to some point on Puget Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.

This is the authority to construct a line, made up of main trunk line and branch, to be located as described.

The second section grants a right of way for 200 feet on each side "of said railroad," with permission to take material for construction "from the public lands adjacent to the line of said road." This grant of right of way and material obviously applies to the entire line, branch as well as main.

The third section makes the land grant in aid of the construction "of said railroad and telegraph line," the grant extending to the specified sections on "each side of said railroad line." The line to be aided, and along which the land grant extends is obviously the entire line, main as well as branch.

The fourth section provides that whenever the company shall have 25 consecutive miles "*of any portion* of said railroad and telegraph line" completed, the President shall appoint commissioners to examine it, and upon their report patents shall issue for the lands "situated opposite to and coterminous with said completed section

of said road." This provision applies in terms to "any portion" of the line, branch as well as main.

The sixth section provides that after the general route shall be fixed the President shall cause the lands to be surveyed "for forty miles in width on both sides of *the entire line* of said road."

Throughout the act, in all the granting sections, the reference is to the railroad as a unit, the main line with the branch constituting one entire line. To this railroad, this entire line, the various grants of right of way, of material, and of land all applied. It was not intended by using the word "branch" in the first section to distinguish the portion of the line to be built down the Columbia Valley from the so-called "main trunk line," and thus deprive the so-called "branch line" of any of the grants or privileges given to the railroad as an entirety. The word "branch" is one of description, not of limitation. Any other word indicative of the portion of the line to be built via the valley of the Columbia River to Portland could have been used with equal force.

IV.

The resolution of May 31, 1870, did not supersede the land grant of July 2, 1864, on the line to be built "via the valley of the Columbia River to a point at or near Portland," but supplemented it. It authorized a new line from Portland to Puget Sound, and in aid of this made an additional land grant. Otherwise the land grant of 1864 remained in force, the change in designation of portions of the railroad then authorized having no effect upon the grant, which

applied to the entire line, irrespective of the description of its parts.

The resolution of April 10, 1869, authorized the Northern Pacific "to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound." No action was taken under this resolution, because, while it authorized the extension from Portland to Puget Sound, it made no accompanying land grant and gave no right to mortgage anything but the right of way, roadbed, and telegraph line, which power was given by the act of March 1, 1869.

The building of the Northern Pacific had not progressed. The company was embarrassed by the omission in the act of 1864 of authority to mortgage the land grant. Without such power funds could not be obtained to build the road. Hence the resolution of May 31, 1870, which, primarily, as shown by its title, was to authorize the Northern Pacific "to issue its bonds for the construction of its road and to secure the same by a mortgage." By this time the company was satisfied its interests would be advanced by building the road down the valley of the Columbia to Portland and from Portland to Puget Sound. Portland was then the metropolis of Oregon and the largest city in the Northwest. The towns on the Sound which have since become cities were then small and comparatively unimportant in the way of furnishing business for a railroad. It was desirable, therefore, to build to Portland first, in order that business might be secured at once for the new road.

There was another reason. A road from the Upper Columbia over the Cascades to Puget Sound was known

to be difficult to construct. There was doubt whether a pass would be found through the Cascades which would warrant the building of a road from Wallula to the Sound. The object of the act of 1864 being to connect Lake Superior with the Pacific Ocean, if the line over the Cascades failed, the road must necessarily reach Puget Sound by way of the valley of the Columbia. To provide for such a road, a new land grant was necessary from Portland to the Sound. Therefore, in the resolution of May 31, 1870, after giving power to issue bonds and mortgage the road and land grant, this authority is given :

> Also to locate and construct, under the provisions, and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound.

Evidently the words "branch" and "main trunk line," as used in the act of 1864, were transposed in the joint resolution, because of the authority given to connect the branch down the Columbia River with Puget Sound by a new line from Portland, and because of the fact that the portion of the line from Wallula to the Sound by way of the Columbia Valley was more likely to be constructed than that from Wallula across the Cascade Mountains. This change in the use of words to designate different portions of the Northern Pacific Railroad could not deprive the portions of the line authorized by the act of 1864 of the land grants then made. The portion of the railroad to be

built over the Cascade Mountains to Puget Sound was authorized by the act of 1864. It could not be deprived of its land grant, which dates from 1864, by calling it a "branch line." Neither could the portion of the Northern Pacific to be built "via the valley of the Columbia to a point at or near Portland," which was authorized by the act of 1864, be deprived of the land grant made it in 1864, by changing its name and calling it a part of the main line instead of the branch. Authority to locate and construct the Northern Pacific, as described in the resolution of May 31, 1870, is given expressly "under the provisions *and with the privileges, grants*, and duties provided for" in the act of July 2, 1864.

Opposing counsel insists that the indemnity provision of the resolution of May 31, 1870, shows that Congress intended by this resolution to supersede the act of July 2, 1864, and make a new grant which would be subject to all railroad grants made from July 2, 1864, to May 31, 1870. This contention is based on the provision that the company shall be entitled to indemnity lands.

> To the amount of the lands that have been *granted*, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864.

But this provision as to lands that have been "granted" evidently applies only to lands lying along the portion of the road first authorized by the resolution of 1870; that is, the line from Portland to Puget Sound. This becomes apparent in view of the next succeeding provision:

> And that twenty-five miles of said main line between its western terminus and the city of Portland, in the

> State of Oregon, shall be completed by the first day of January, anno Domini 1872, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points.

The opinion of this court in *United States* v. *Northern Pacific R. R. Co.* (152 U. S., 284), is conclusive upon the point that the resolution of 1870 authorized a new road only from Portland to Puget Sound, and made a new grant only between these points. The court, speaking by Mr. Justice Harlan, says (p. 294):

> We can not agree that this resolution is to be held, in this respect, as simply a recognition by Congress of an existing right in the company to locate and construct a road from Portland to Puget Sound, with the right to obtain lands in aid thereof, as provided in the act of 1864. *On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a new road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound.*

V.

The words "via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon," used in the act of July 2, 1864, locates the so-called branch line with sufficient certainty to identify the lands granted in aid of its construction, and thus preclude the junior grant in 1866 to the Oregon and California from attaching.

The power of Congress to locate the railroad along which a land grant is made must be conceded. Ordinarily, of course, the land grant is made in aid of a line

the location of which is left with the railroad company. But the limits of the discretion vested in the railroad company are usually defined. Under the grant of 1864, no unlimited discretion was reposed in the Northern Pacific Company.

The act authorized the company to locate and construct its main line, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; "thence westerly by the most eligible railroad route, *as shall be determined by said company*," on a line north of the forty-fifth degree of latitude to some point on Puget Sound. As to the main line, authority is thus expressly vested in the company to select the most eligible railroad route within the limitations of the grant. This authority, however, did not give the company the power to cover an unlimited extent of country north of the forty-fifth degree of latitude. In *United States* v. *Northern Pacific Railroad Co.* (152 U. S., 284), Mr. Justice Harlan, speaking for the court, says (p. 292):

> On the contrary, as said in *St. Paul and Pacific Ry* v. *Northern Pacific Railroad* (139 U. S., 1, 13), "when the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed *upon the most direct and practicable line*. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.

Taking into consideration the provisions with regard to the location of the branch down the Columbia, this

court reached the following conclusion with respect to the location of the main trunk line (p. 292):

> It is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound which would not touch any point "at or near Portland," and the western end of which would be east and northeast of a direct line between Portland and Puget Sound.

Within the limitations thus indicated, Congress, in the grant of 1864, gave the Northern Pacific Company the power to locate the main trunk line; but with respect to the "branch," Congress located it in the act itself, leaving to the company to select the suitable place, not more than 300 miles from the western terminus of the main trunk line, where the branch was to join it. The location of the branch is defined in the act. It is to be built "via the valley of the Columbia River." The western terminus is fixed at a point "at or near Portland, in the State of Oregon." The object of Congress is thus stated by Mr. Justice Harlan in the case just cited (152 U. S., 293):

> It is clear that the purpose of Congress, by the act of 1864, was not to connect Portland with Puget Sound by a road established upon the most direct or eligible route between those places; *but, so far as Portland and its vicinity were concerned, to connect them with the East by a branch road, through the valley of the Columbia River, that would strike the main trunk line connecting Puget Sound and Lake Superior.*

The court will observe that the lands in controversy lie adjacent to the western terminus of the "branch," which is fixed by the act itself "at or near Portland."

There is no uncertainty, therefore, such as would exist with reference to "the suitable point" at which the branch would connect with the main trunk line.

Judicial notice of the topography of the section of the country involved in this case may be taken. The valley of the Columbia is practically a narrow gorge, at no place more than 6 miles wide. Through the Cascade gorge it is only 600 or 700 feet wide. If the court will not take such judicial notice, pertinent evidence is in the record. Habersham, an engineer and surveyor, thus describes the valley of the Columbia (Record, p. 123):

> It is some 5 or 6 miles wide at Vancouver; across to the peninsula, between 3 and 6 miles, it varies considerably, and then it narrows until about at the Cascade gorge it is only 600 or 700 feet wide—above that, it varies in width; above the Cascades, from a quarter of a mile to a half a mile to three-quarters. It is mountainous on both sides from the Sandy River up to Wallula; there the east bank is not so precipitous, and above Pasco I do not, of my personal knowledge, know anything.

A railroad "via the valley of the Columbia River," whether built on the north or the south side of the river, would practically follow the meanders of the river, not of the mountains which form the boundaries of the valley. It would of necessity be built *on the most direct and practicable* line (152 U. S., 292). The land grant carried a strip 20 miles wide on each side of the road when it ran through a State, and a strip 40 miles wide on each side when it ran through a Territory. The land office has put the practical construction on this provision, that if the road runs through a Territory, the land grant belt is 40

miles wide on each side, even if thus measured it extends into a State. In other words, the road if constructed on the north side of the Columbia through the Territory of Washington, would carry a land grant 80 miles wide, and if constructed along the south side through the State of Oregon, a land grant only 40 miles wide. It followed from this, that the road would inevitably be located on the north side of the Columbia River. But if the land office was wrong in its construction, and if the road when built on the north side in Washington only carried a strip 20 miles wide in Oregon, then the location of the line north of the river would be the more advantageous location for the Oregon and California. Located south of the river and nearer Portland, which is on the south side, the Northern Pacific grant would cut deeper into the Oregon and California grant.

For these reasons, I submit to the court that the act itself, read in the light of the existing conditions, was notice to the Oregon and California that the lands in controversy were appropriated and set apart for the benefit of the Northern Pacific. The Northern Pacific could reach a point "at or near Portland" neither by the north nor by the south side of the river without taking these lands under its grant. For this reason, the lands were of necessity reserved by the Government for the use of the Northern Pacific. They were "granted" lands within the exception of the Oregon and California grant.

To effectuate the intention of the grantor, grants more indefinite than the land grant along the branch via the valley of the Columbia have been sustained. (*Newson* v. *Prior*, 7 Wheat., 7; *United States* v. *Arredondo*, 13

Pet., 133; *Johnson* v. *Pannel's Heirs*, 2 Wheat., 206.) These authorities support the principle that where a grant is by a river the line follows the meander and that such words as "at," "about," or "near" a fixed monument or natural object may be rejected so that the object itself will establish the line.

If, on account of engineering difficulties, it became necessary, upon actual construction, to deviate from the route shown upon the map of location such deviation, provided the road kept within the limits of the grant, would not affect rights acquired under the grant by reason of such location laid down in the charter, the company had a right to do so, and to do so without filing a map.

In *Van Wyck* v. *Knevals* (106 U. S., 360, 369) the court said:

> As to the alleged deviation of the road constructed from the route laid down in the map, admitting such to be the fact, the defendant is in no position to complain of it; the lands in controversy are within the required limit, whether that be measured from one line or the other. A deviation of the route without the consent of Congress, so as to take the road beyond the lands granted, might perhaps raise the question whether the grant was not abandoned; but no such question is here presented. The deviation within the limits of the granted lands in no way infringed upon any rights of the defendant.

The rule in the Interior Department is the same, and it has been there uniformly held that the deviation from the line of definite location within the limits of the grant does not impair the grant of lands. (*Rogers* v. *A. & P.*

R. R., 6 L. D., 565; *Chicago, etc., Railroad Co.*, 6 L. D., 209; *McGregor Western Railroad*, Op. Atty. Genl., Vol. 16, p. 457.)

The court will observe that the overlap in question is at the western terminus of the Northern Pacific branch and the northern terminus of the Oregon and California road. The Northern Pacific ran west, the Oregon and California north. The grant of the Northern Pacific was 80 miles wide, with the road located on the north side of the river. It was impossible for the Oregon and California, with a land grant 40 miles wide, to reach Portland without overlapping the Northern Pacific grant, and the Oregon and California knew it. It took its grant in 1866 with a knowledge of and subject to the prior grant to the Northern Pacific in 1864. It did not have to wait for a definite location, by a surveyed map, of the Northern Pacific branch line to Portland in order to know within what limits the land grant to the Northern Pacific would fall. The act of 1864 itself made plain where the portion of the Northern Pacific land grant which affected it would fall.

VI.

As to the portion of the Northern Pacific line between Wallula and a point near Portland, the Perham map of 1865 was a sufficient map of general route, and the filing of it operated as a statutory withdrawal of the lands in dispute.

The Perham map appears in the record (marked 336, between pp. 164 and 165). While Perham, then president of the Northern Pacific, in his letter to the Secretary of the Interior (Record, p. 81), states that he has

designated on the map "the general line of their railroad from a point on Lake Superior, in the State of Minnesota, to a point on Puget Sound, in Washington Territory, via the Columbia River," yet there is no indication on the map which line from Wallula west is the main and which the branch line. The lines indicated on the map from Wallula west form a triangular loop. There is a line northwesterly across the Cascades to Puget Sound; a line via the valley of the Columbia, on the north side of the river, westerly to a point opposite Portland; and a line from the point on the Columbia opposite Portland northerly or northeasterly to a point on Puget Sound.

Adopting the view taken by this court in *United States* v. *Northern Pacific Railroad Co.* (152 U. S., 284), the portion of the line designated on the map, from a point on the Columbia River near Portland to Puget Sound, was not authorized by the grant of 1864; but the line down the Columbia River to a point near Portland and the line across the Cascades to Puget Sound were authorized. The unauthorized line on the map can be rejected. The map is good so far as the authorized lines are concerned (*United States* v. *Southern Pacific R. R.*, 146 U. S., 570, 597), and it was not necessary to mark one the "main line" and the other the "branch." Whether main or branch, the lines were part of the railroad authorized by the act. The grant of the right of way (section 2), the grant of the material for construction (section 2), and the grant of the land subsidy (section 3), each accompany the "railroad line," and the entire railroad line, and was not limited by any reference to the main line or branch line.

While Mr. Usher, then Secretary of the Interior, recommended the withdrawal requested by Mr. Perham, the Acting Commissioner of the General Land Office, Mr. Wilson, declined to do so on the ground that the established ruling of the Department required "a connected map showing the exact location, the map indicating by flagstaffs the progress of the survey." These and other objections urged by the General Land Office were not valid. It has never been held that the map of general route must show a line definitely located upon the ground with all the accuracy of a final survey. The requirements for a map of general route under the Northern Pacific grant were considered by this court in *Butz* v. *Northern Pacific Railroad* (119 U. S., 55, 72).

> The general route may be considered as fixed when its general course and direction are determined, *after an actual examination of the country or from a knowledge of it*, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass.

The letter of Mr. Wilson, Acting Commissioner of the Land Office, shows that at the time the Perham map was filed a large portion of the public lands on the line of the Northern Pacific were unsurveyed (Record, p. 84.):

> No withdrawal can now be made on account of the road in the region of country extending across that part of the continent between the west boundary of Minnesota to the eastern surveys of Washington Territory, because over that Territory the lines of the public surveys have not yet been established.

The Perham map designates the line down the valley of the Columbia by a reference to the Columbia River. By the scale of the map its distance from that river to any point is approximately ascertainable. The map was sufficiently definite to warrant a withdrawal of the granted lands within the place limits along the line down the Columbia River. I submit that the rights of the company could not be defeated by the fact that the Commissioner of the General Land Office took an erroneous view of the law. In the case of *Baltz* v. *Northern Pacific Railroad*, to which I have already referred, this court said, respecting the effect of the filing of the map of general route (p. 72):

> When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, *the law withdraws from sale or preemption the odd sections to the extent of 40 miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted.* Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preemption, it has been the practice of the Department in such cases to formally withdraw them. It can not be otherwise than the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands, and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless.

Again, in *St. Paul and Pacific Ry.* v. *Northern Pacific Ry.* (139 U. S., 1), Mr. Justice Field, speaking for the court, said (p. 18):

> They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road.

It was not necessary that the map should be good for the whole road. If good on the branch "via the valley of the Columbia to a point at or near Portland," the filing of it worked a withdrawal of the lands opposite to that portion.

In *St. Paul and Pacific Railroad Co.*, v. *Northern Pacific Railroad Co.* (139 U. S., 1), being a suit to establish the right of the Northern Pacific to land in Minnesota, claimed under the act of July 2, 1864, Mr. Justice Field, speaking for the court, says (bottom p. 18):

> It is indeed contended that there is no evidence that any general route was fixed, meaning thereby the general route *for the whole length of the road*. If this were the fact, which is not conceded, the result would not be changed, as supposed by counsel. The contemplated railroad from Lake Superior to Puget Sound was about 2,000 miles in length, and it was not expected that there should be a general designation of the whole route over this distance before any land should be withdrawn or any rights of the company should attach. *The general purpose of the act was accomplished if such reasonable portions*

of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company. The withdrawal in any case would only extend along the route which was fixed, and a map of which was filed in the Department.

In *United States* v. *Southern Pacific Railroad Company* (146 U. S., 570) the court, speaking by Mr. Justice Brewer, said) p. 597):

> So the question is whether the filing a map of definite location from the Colorado River through San Buenaventura to San Francisco, under a claim of right to construct a road the entire distance, is good as a map of definite location from the Colorado River to San Buenaventura, the latter point being the limit of the grant. We think, unquestionably, it is. Though a party claims more than he is legally entitled to, his claim ought not to be rejected for that to which he has a right. The purpose of filing a map of definite location is to enable the Land Department to designate the lands passing under the grant; and when a map of such a line is filed full information is given, and, so far as that line may legally extend, the law perfects the title. It surely can not be that a company must determine at its peril the extent to which its grant may go, or that a mistake in such determination works a forfeiture of all its rights to lands.

With respect to the grant from Wallula to Portland, the Perham map was such a map of general route as was contemplated by the act of 1864. It was, from the nature of the country, practically the only map that ever could be filed. True, no withdrawal of lands was made by the Commissioner of the General Land Office upon

the filing of this map, but the action of the Land Department with reference to the map is not important. There is no provision in the act of 1864 that contemplates an approval of the map of general route by the Commissioner of the General Land Office or the Secretary of the Interior. The act contains a legislative withdrawal within itself upon the filing of the map. In this respect it differs from nearly all the land-grant acts up to that time. I have already referred to the unwarranted requirements made by the Commissioner of the General Land Office. The recommendation of the commissioner could not, however, affect the company. The company had filed its map, and by so doing had complied with the act. The law itself did the rest.

The recommendation of the commissioner was never acted on by the Secretary. The Perham map remained on file in the Land Department as a public record. It still remains there. It must be presumed that the act of July 25, 1866, was passed by Congress with full knowledge of the existence of this map and its legal effect, and that the Oregon and California Railroad Company took its grant with a like knowledge. In 1866, when the Oregon and California Railroad Company took its grant, the Northern Pacific Company had an inchoate right to these lands by the location, in the act of 1864 itself, of the branch line "down the valley of the Columbia," and by the filing of the Perham map, designating the railroad down the valley of the Columbia on the north side of the river.

I have already referred to the rule that in construing the acts of 1864 and 1866 it is the duty of the court to ascer-

tain and give effect to the intention of Congress, for these acts were laws as well as grants. Considering the length of the road, the condition of the country through which it passed, the difficulties, engineering and financial, which attended its construction, the length of time allowed for its completion—twelve years, subsequently increased to sixteen years—it will be unreasonable to assume that Congress, within two years from the passage of the act, intended to take away any portion of the land granted to the Northern Pacific Company.

In closing this point, let me suggest that the sufficiency of the Perham map on this part of the route is conclusively shown by the approval of the map of August 13, 1870, which, down the Columbia River to a point opposite Portland, is identical with the Perham map.

VII.

Whether the Perham map was or was not a sufficient map of general route as to that portion of the Northern Pacific line between Wallula and a point at or near Portland, the filing of it by the company amounted to a claim by the Northern Pacific that it was entitled by law to have the lands in dispute withdrawn and reserved for its benefit. The claim thus made and never withdrawn operated to put these lands sub judice, to separate them from the mass of public lands and prevent the Oregon and California grant of 1866 from attaching.

Upon the filing of a sufficient map of general route the law works a withdrawal. Such withdrawal is to preserve the withdrawn lands for the benefit of the railroad company. The Commissioner of the General Land Office as-

sumed the authority to reject the Perham map. So far as concerns the branch line via the Columbia Valley, he rejected it upon obviously insufficient grounds. But whether he had authority to reject it, and if so, whether he acted upon valid grounds, are questions which were not finally and conclusively adjudicated prior to the grant of 1866 to the Oregon and California. When Congress made the grant in 1866 to the Oregon and California, the Northern Pacific was insisting that under its grant of 1864 and the Perham map filed in 1865 these lands by operation of law were withdrawn and reserved for its benefit.

The Northern Pacific never withdrew the Perham map. It never modified or changed the location of its line down the valley of the Columbia River to a point at or near Portland, as shown on the Perham map. The line designated on the map of August 13, 1870, for this portion of the route is identical with that indicated on the Perham map. Changes were made by the Northern Pacific on other portions of its route, but never on this, for the obvious reason that the contour of the country and the express provision of the law itself confined the company substantially to the line designated on the Perham map.

The resolution of April 10, 1869, authorized the company "to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound," the design being to authorize the entire line shown on the Perham map. No action was taken under this resolution because it made no land grant for the extension and authorized no mortgage (see Point IV).

The resolution of May 31, 1870, authorized the construction of the main road—

> To some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound.

The Northern Pacific claimed that the effect of this resolution was to approve and confirm the Perham map. It claimed that, under the act of 1864, it was authorized to construct its main line from Lake Superior to Puget Sound by the most eligible route, and if it determined that the most eligible route was via the valley of the Columbia River, it had a right to locate its main line down that valley. Judge Sawyer, in *United States* v. *Northern Pacific R. R. Co.* (41 Fed. Rep., 842), sustained this contention of the Northern Pacific, holding that the resolution of 1870 was an approval and confirmation of the Perham map and the location made by it. The judge also held that the Perham map was a sufficient indication of the general route, upon which a statutory withdrawal took effect (bottom p. 847).

In the case of the *United States* v. *Northern Pacific R. R. Co.* (152 U. S., 284) this court overruled the contention, holding that the joint resolution was not simply a recognition by Congress of an existing right, in the company, to locate and construct a road from Portland to Puget Sound, but, on the contrary, should be regarded as giving a subsidy of lands in aid of a new road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound (p. 294).

This court has never passed upon the question whether,

as to the branch to be constructed via the valley of the Columbia River to a point at or near Portland, the Perham map was or was not a sufficient map of general route. If the map was sufficient, the law withdrew these lands in 1865, so that obviously the Oregon and California grant of 1866 could not attach. But did not the filing of the map and the claim by the Northern Pacific that it was valid and worked a withdrawal have the same effect? Thus a mixed question of law and fact was raised by the company upon the decision of which depended an interest which it claimed in the land. This court has frequently held that a pending claim is sufficient to prevent a railroad land grant from attaching, although subsequently the claim is held by the courts to be fraudulent and void.

In *Newhall* v. *Sanger* (92 U. S., 761), a grant of land in California was made, under the act of July 1, 1862, to a railroad company. The company filed its map of general route probably in January, 1865. A withdrawal was made on January 31, 1865. The land in dispute was within the boundaries of an alleged Mexican grant which was *sub judice* at the time of the grant and withdrawal to the railroad, although the Mexican claim was rejected as fraudulent on February 13, 1865. It was held that lands thus claimed under the Mexican grant were not public lands, and could not be until the claim had been disposed of. For this reason the railroad company acquired no title to them. The court speaking by Mr. Justice Davis, said (bottom p. 762):

> There can be no doubt that, by the withdrawal, the grant took effect upon such odd-numbered sec-

tions of public lands within the specified limits as were not excluded from its operations; and the question arises whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, are public within the meaning of the acts of Congress under which the patent, whereon the appellee's title rests, was issued to the railroad company.

In the case of *United States* v. *McLaughlin* (127 U. S., 428) the United States brought a bill to cancel a patent issued to the Central Pacific under its land grant, on the ground that the land in question was covered by a Mexican grant and therefore not public land within the meaning of the railroad grant. This court, speaking by Mr. Justice Bradley, held against the Government, on the ground that the Mexican grant was a float to be located within the limits of a territory largely in excess of the actual grant. The precise location of the land granted under the Mexican land grant was subject to the determination of the Government. The court took the view that if enough land was reserved within the limits of the larger territory to satisfy the Mexican grant, the rest of the land within such territory might be treated as public land and granted to the railroad company.

The case of *Carr* v. *Quigley* (149 U. S., 652), in which Mr. Justice Field delivered the opinion, like the McLaughlin Case, was a controversy between a Mexican grant and a Pacific railroad grant. The court held that lands within the exterior limits of a Mexican grant under judicial investigation at the time of the definite location of the Central Pacific were not "reserved" so as to be taken out of the class of public lands, but inured

to the road as a part of its land grant, thus following the McLaughlin Case and upon the same grounds.

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> It was for the Government itself to prescribe the limits from which the quantity granted by the Mexican Government should be selected, and having reserved sufficient from the exterior boundaries to satisfy that amount it was perfectly competent for it to grant any surplus remaining, and it appears from the actual survey of the specific quantity granted by Mexico that the Congressional grant to the railroad company was outside of any of the land thus appropriated.

In the present case, however, the Government did not have the option of determining the location of the land grant made to the Northern Pacific under the act of 1864. Congress, in the act itself, indicated where it desired the branch line located, and the company, in accordance with that direction, filed its map designating the portion of its line "via the valley of the Columbia River to a point at or near Portland." Having done this, the lands within the place limits of the designated line became sufficiently identified and ceased to be public lands in the sense that it would be included in any subsequent railroad land grant containing the usual terms of exception. Nothing in the entire jurisprudence of this country is more firmly established than that an undetermined claim or a reservation of land severs it from the mass of "public land" so that it will not pass under railroad aid grants. (*Wilcox* v. *Jackson*, 13 Pet., 498; *Leavenworth, etc., R. R.* v. *U. S.*, 92 U. S., 740; *Newhall* v. *Sanger*, 92 U. S., 761; *K. P. R. R.* v.

Dunmeyer, 113 U. S., 629; *Doolan* v. *Carr*, 125 U. S., 618; *Hastings Railroad* v. *Whitney*, 132 U. S., 357; *U. S.* v. *Missouri R. R.*, 141 U. S., 358; *Sioux City Land Co.* v. *Griffey*, 143 U. S., 32, 41; *Bordon* v. *N. P. R. R.*, 145 U. S., 535; *Cameron* v. *U. S.*, 148 U. S., 301; *Whitney* v. *Taylor*, 158 U. S., 85, 92, 93; *Shiver* v. *U. S.*, 159 U. S., 491, 494; *N. P. R. R.* v. *Sanders*, 166 U. S., 620, 633.)

It has been repeatedly held that, when a proper map of general route is filed, the law operates to withdraw the lands within the limits of the grant, and this withdrawal takes effect whether it is expressly ordered by the Secretary of the Interior or not. (*Missouri R. R.* v. *Kansas R. R.*, 97 U. S., 491; *Van Wyck* v. *Knevals*, 106 U. S., 360; *Railroad* v. *Dunmeyer*, 113 U. S., 629; *Walden* v. *Knevals*, 114 U. S., 373; *Buttz* v. *N. P. R. R.*, 119 U. S., 55; *St. Paul, etc., R. R.* v. *N. P. R. R.*, 139 U. S., 1; *U. S.* v. *S. P. R. R.*, 146 U. S., 570; *U. S.* v. *N. P. R. R.*, 152 U. S., 284; *Railroad* v. *Forsyth*, 159 U. S., 46.)

VIII.

The question is submitted whether, as to the portion of the Northern Pacific, "via the valley of the Columbia," from Wallula to Portland, the map of August 13, 1870, was not in effect a map of definite location. Did it not so fix the route of the road on this portion as to identify the granted lands so that the title in the Northern Pacific attached as of the date of the original grant of 1864?

With respect to this portion of the road from Wallula to opposite Portland, the line designated on this map is identical with that laid down on the Perham map (*United*

States v. *Northern Pacific R. R.*, 152, U. S., 284, 290). Under it a withdrawal of the lands in question was ordered. This fact conclusively shows that the Perham map was a sufficient and valid map of general route on this portion of the line, and that there was a legislative withdrawal at the time of its filing. Any uncertainty or or change as to other portions of the railroad did not affect this portion, which remained unchanged from the beginning.

The map of August 13, 1870, is to be found in the record facing page 164 and marked 333. The certificate of Edward T. Johnson, engineer in chief of the Northern Pacific since June, 1866, states (Rec., p. 87):

> That during the period above named, surveys and explorations have been made at various places on the proposed route for said road for determining its proper location, and that in connection with said surveys examinations have been made and information has been collected relative to other portions of said route sufficient to enable the said company to determine approximately, and by reference to appropriate landmarks, the proper position for the line of their said road on those portions, with a view to the withdrawal from market or from settlement of the lands granted to the said company on either side of their said road.

In other words, Mr. Johnson says that part of the route has been surveyed and explored to determine its proper location, and examinations have been made and information has been collected relative to other parts of the route sufficient to enable the company to determine the line approximately. Mr. Johnson then describes the

routes designated on the maps, the following being the description from Portland to Wallula (Rec., p. 89):

> Thence from Fort Vancouver, following the right or northerly bank of the said Columbia River, on or near the line of high-water mark of the same, eastwardly through the Cascade range of highlands to a point opposite the mouth of the Walla Walla River, a distance of 190 miles, more or less.

The certificate of Gregory Smith, the president of the Northern Pacific, contains the following (Record, p. 90):

> It is hereby certified that in pursuance of the act of Congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and the several acts amendatory thereto, certain portions of the line or route for said road were so far *definitely fixed by resolution* of the board of directors of said company on the eighth day of July, A. D. 1870, as to make it the duty of the president of the said company to request the honorable the Secretary of the Interior to withdraw or withhold from sale and settlement the public lands to which said company are entitled on either side of the lands of their road so described as aforesaid in the certificate of their engineer in chief.

The letter from Secretary Cox to the Commissioner of the General Land Office, transmitting these maps, speaks of them as "two maps showing *the designated route* of the Northern Pacific Railroad" (Record, p. 79).

The letter from the Commissioner of the General Land Office to the register and receiver at Oregon City, Oreg., transmits "a diagram showing *the designated route* of the

Northern Pacific Railroad under the act of July 2, 1864" (Record, p. 80), and directs the withdrawal.

An examination of the Record discloses that changes were made in other portions of the line designated on the map of August 13, 1870, but no change was made on the portion between Wallula and Portland, and no change was contemplated. In view of the provisions of the law itself, the location of this portion of the line was not an approximate but a definite location. Undoubtedly the company never intended the map of 1870 to be treated as a map of definite location for its entire route from Lake Superior to Puget Sound, but it did intend that certain portions of this route should be treated as definitely fixed. The only means we have of ascertaining upon what portions it intended the map to be a map of general route, with the reserved power to change, and upon what portions a map of definite location, with no contemplation of changing, is to inquire on what portions of the route changes were made and subsequent maps filed. Certainly no subsequent map was filed of this portion of the line between Wallula and Portland, and therefore this map of 1870, as to that portion, may be treated as a map of definite location.

Secretary Cox, in transmitting the map of 1870 to the General Land Office, and the Commissioner of the General Land Office, in transmitting the same to the register and receiver at Oregon City with directions for a withdrawal, speaks of the map as one "showing the designated route" of the road. A "designated" route is a route of definite location. This court, speaking by Mr. Justice Harlan,

so held in the recent case of *Southern Pacific R. R. Co.* v. *United States* (168 U. S., 1, 54):

> The word "designated" in that act meant no more nor less than the words "definitely located" mean.

As to the entire route from Lake Superior to Puget Sound, the map of 1870 may very properly be termed a map of general route, but as to the portion from Wallula to Portland it is in effect a map of definite location. The description which accompanies the map locates the line of the road with all requisite certainty. From Fort Vancouver it is to follow the right or northerly bank of the Columbia River, on or near the high-water mark of the stream, eastwardly through the Cascade range of highlands to a point opposite the mouth of the Walla Walla River. Certainly there is no lack of certainty in this route. It identifies the lands within the granted limits so there can be no difficulty in specifying them, and in point of fact a withdrawal was promptly made and never changed.

In the earlier cases, where, after the filing of a map of general route, and a withdrawal under it, the road was built on the line thus designated, the court held that the filing of such a map of general route had the effect of filing a map of definite location. The map of general route, not being modified or changed, became the map of definite location, upon which the road was built.

The case of *Newhall* v. *Sanger* (92 U. S., 761) grew out of a grant of land in California, under the Union Pacific act of July 1, 1862, to the Western Pacific Railroad Company. The act made a grant of certain sections "not sold, reserved, or otherwise disposed of by

the United States, and to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed" (sec. 3, act July 1, 1862; 12 Stats., 492). The act also requires that "within two years after the passage of said act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within 15 miles of said designated route or routes to be withdrawn from preemption, private entry, and sale" (sec. 7, act of July 1, 1862; 12 Stats., 493). The company filed its map of general route probably in January, 1865; at any rate the withdrawal was made on January 31, 1865. The land in dispute was within the boundaries of an alleged Mexican grant which was *sub judice* at the time of the grant, the filing of the map, and the withdrawal, the claim not being finally rejected until February 13, 1865. The court held that the lands thus claimed under this Mexican grant, ultimately held fraudulent and void, were not public lands, and for this reason the railroad company acquired no title to them. It is notable that the filing of the map of general route and the withdrawal under it are treated by the court as the important fact in determining whether the title of the railroad company attached. The court, speaking by Mr. Justice Davis, says (bottom p. 762):

> There can be no doubt that, by the withdrawal, the grant took effect upon such odd-numbered sections of public lands within the specified limits as were not excluded from its operation; and the question arises

whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, a republic within the meaning of the acts of Congress under which the patent, whereon the appellee's title rests, was issued to the railroad company.

So, in the case of *M. K. & T. R. R.* v. *K. P. R. R.* (97 U. S., 491). In that case it is stated that the grant to the Kansas Pacific was made in 1862, and a map of general route filed in 1866, and the road completed in 1867. The M. K. & T. grant was made in 1866, and the map of its route filed in December, 1866.

IX.

Opposing counsel insist that the map of 1870 was one of general route. Conceding this to be true, did not the resultant withdrawal of these lands divest the Oregon and California of the title it claims attached by filing its map of definite location in 1869? If so, when did or could such title reattach? The withdrawal reserved the lands for the benefit of the Northern Pacific until the forfeiture, which was made for the benefit of the Government.

The claim of the Oregon and California is that by filing its map of definite location on October 29, 1869, it acquired the title to these lands under its grant of July 25, 1866. But at this time the Northern Pacific, under its grant of 1864, had the right to locate and construct its road so as to earn and take these lands as against the Oregon and California under its junior grant.

The grant of July 2, 1864, conferred upon the Northern Pacific a number of rights with respect to these lands.

In the first place, under section 6 of the act, it had a right to so locate its line by the filing of a map of general route as to entitle it to have these lands withdrawn for its benefit.

In the second place, by filing its map of definite location, under the third section of the act of 1864, it had a right to acquire the title to these lands.

In the third place, under section 4, by presenting proof of the completion of specified portions of the road, it had a right to obtain patents confirming its title to the lands.

Upon the theory of the other side, it exercised only the first of these rights. It filed its map of general route, and thereby selected these lands for withdrawal for its benefit. This was done on August 13, 1870. But at this time the title of the Oregon and California had attached, because of the prior filing of its map of definite location. In view of this, what was the effect of the withdrawal made for the benefit of the Northern Pacific? Was it a withdrawal subject to the rights of the Oregon and California? I think not. If the Northern Pacific had followed the withdrawal by a construction of its railroad opposite to these lands, it would have taken them free from any claim of the Oregon and California. The withdrawal amounted to a provisional selection for the benefit of the Northern Pacific. Its object was to preserve the status of the lands, so the Northern Pacific might earn them by building its road opposite to them. The inevitable result, therefore, of the withdrawal, which took effect upon the filing of the map of general route,

was to clear the land of whatever title had attached in favor of the Oregon and California, under its map of definite location in 1869.

To repeat, no matter if the Oregon and California did file its map of definite location before the Northern Pacific had filed its map of general route, nevertheless the Northern Pacific under its prior grant had a right, after the filing of the map of definite location of the Oregon and California, to select and earn these lands. It had a right to construct its road opposite to these lands and take them under its grant. It had a right to precede its construction by a map of definite location and, by filing it, attach its title to these lands. It had a right to precede its map of definite location by a map of general route and thus select these lands and have them withdrawn for its benefit. It took the first of these three steps—it filed its map of general route. The lands were withdrawn for its benefit. By that act whatever provisional title the Oregon and California may have acquired was swept aside, its title was divested, the lands were set apart and preserved for the benefit of the Northern Pacific.

In the case of the *United States* v. *The Southern Pacific Railroad* (146 U. S., 570), where the contest was between two railroad grants, that to the Atlantic and Pacific being prior in point of time, Mr. Justice Brewer, speaking for the court, says (p. 597):

> In this connection reference may be had to the contention of the Southern Pacific Company that it filed its map of definite location on April 3, 1871, more than a year before the filing of its map by

> the Atlantic and Pacific Company; that, therefore, its title then attached to these lands, the same as to any other lands along its line; and that if such title was displaced by any subsequent filing of the Atlantic and Pacific Company's map it was only conditionally displaced; that is, displaced on condition that the Atlantic and Pacific Company should, by the final completion of its road, perfect its right thereto. But whatever title or right the Southern Pacific Company might acquire by a prior filing of its map *was absolutely displaced* when the Atlantic and Pacific Company's map was filed.

How, then, was it possible for the Oregon and California title to reattach? When could or did such title reattach? The withdrawal preserved the status of the lands until the forfeiture in 1890. And the forfeiture was for the benefit of the Government.

Observe the wording of section 6, under which the withdrawal takes place. It is "the odd sections of land hereby granted" which are withdrawn. The sections withdrawn are treated as the sections granted, until the company modifies its route and selects other lands. Being thus treated as "the odd sections of land hereby granted" they are treated as sections granted at the time of the grant, which is one *in presenti*, and therefore free from junior railroad grants.

Respecting the effect of filing the map of general route, and in support of the point I make that by a withdrawal certain rights, however inchoate or provisional they may be, do attach to the withdrawn lands in favor of the railroad company for whose benefit they have been set aside, I refer to the following cases, merely observing

that if, by the withdrawal, the railroad company for whose benefit it is made acquires any interest whatever in the land, or any title, however inchoate or imperfect, the lands become in a sense "granted lands," and subject to forfeiture by the Government. Until forfeited they must needs remain withdrawn lands, lands which, for the benefit of the grantee, the Government has set aside to preserve (using the language of Mr. Justice Field, in 139 U. S., 1, 18) "unencumbered until the the completion and acceptance of the road."

In *Baltz* v. *Northern Pacific Railroad Co.* (119 U. S., 55), the effect of filing the map of general route under the act of July 2, 1864, was before this court. Mr. Justice Field, speaking for the court, said (p. 71):

> The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from preemption, grant, or other claims or rights; but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or preemption of the adjoining odd sections within 40 miles on each side, until the definite location is made. The sixth section declares that after the general route shall be fixed, the President shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or preemption before or after they are surveyed, except by the company. The general route

> may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the Land Department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office or the Secretary of the Interior *the law withdraws from sale or preemption the odd sections* to the extent of 40 miles on each side.

Subsequently, in *St. Paul and Pacific Railroad Co.* v. *Northern Pacific Railroad Co.* (139 U. S., 1), being a suit by the Northern Pacific to establish its right to land in Minnesota as against the St. Paul and Pacific, this court, by the same justice, had occasion again to express its views with respect to the effect of the filing of a map of general route, as follows (p. 18):

> It is indeed contended that there is no evidence that any general route was fixed, meaning thereby the general route for the whole length of the road. If this were the fact, which is not conceded, the result would not be changed, as supposed by counsel. The contemplated railroad from Lake Superior to Puget Sound was about 2,000 miles in length, and it was not expected that *there should be a general designation of the whole route over this distance before*

any land should be withdrawn or any rights of the company should attach. The general purpose of the act was accomplished if such reasonable portions of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company. The withdrawal in any case would only extend along the route which was fixed, and a map of which was filed in the Department.

It will be observed that the court does not take the position that no rights of the company attached until the definite location is made, but, on the contrary, holds that it is only necessary that the partial designation of the general route should be made in order that land be withdrawn and rights of the company attach.

In *Northern Pacific Railroad Co.* v. *Sanders* (166 U. S. 620) it was held that the filing of a claim as mineral land, upon lands within the limit of the Northern Pacific grant of 1864, as shown by its map of general route filed February 21, 1872, but before the filing of the map of definite location on July 6, 1882, operated to except such land from the Northern Pacific grant. This was on the ground that the filing of the mineral claim put the land covered by it within the exception defined by the third section of the grant of 1864. It thus became land to which a claim had attached, land *sub judice*. The existence of the claim was sufficient. The validity of the claim was a matter to be settled subsequently between the Government and the claimant. It is to be observed that the Northern Pacific grant, like other railroad grants, did not apply to mineral land. It only covered "public land not mineral."

The court cites *Kansas Pacific Ry.* v. *Dunmeyer*, 113 U. S., 629; *Hastings & Dakota R. R.* v. *Whitney*, 132 U. S., 357, 366; *Whitney* v. *Taylor*, 158 U. S., 85, 92, 93; *Sioux City, etc., Land Co.* v. *Griffey*, 143 U. S., 32, 34, and *Shiver* v. *U. S.*, 159 U. S., 491, 494, saying, by Mr. Justice Harlan, p. 633:

> The principles announced in these cases fully sustain the proposition that if the above applications of record to purchase these lands as mineral lands were "claims" within the meaning of the act of July 2, 1864, then the lands were excepted from the operation of that act and could not have come under the grant to the railroad company even if, subsequently to the definite location of the road, the applications for them were finally rejected because of the fact that they were ascertained not to be mineral lands.

Respecting the effect of filing the map of general route, the court says (bottom p. 634):

> The company acquired, by fixing its general route, *only an inchoate right to the odd-numbered sections granted by Congress*, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted.

This language was quoted with approval in the carefully considered case of *Menotti* v. *Dillon*, 167 U. S., 703, 720.

In *Northern Pacific Railroad Co.* v. *Musser-Sauntry Co.* (168 U. S., 604), it was held that a withdrawal of lands within the indemnity limits of the grant of 1856 to the State of Wisconsin to aid in the construction of a railroad exempted such lands from the operation of the

grant to the Northern Pacific Railroad Company by the act of July 2, 1864. Mr. Justice Brewer, who delivered the opinion, says (bottom p. 607):

> The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation. (*Wolcott* v. *Des Moines Co.*, 5 Wall, 681; *Wolsey* v. *Chapman*, 101 U. S., 755, and cases cited in the opinion; *Hamblin* v. *Western Land Company*, 147 U. S., 531, and cases cited in the opinion.) It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. (*St. Paul and Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S., 1, 17, 18; *Wisconsin Central Railroad* v. *Forsythe*, 159 U. S., 46, 54; *Spencer* v. *McDougal*, 159 U. S., 62.)

Again, page 608:

> But beyond the significance of the word "reserved" alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. "Otherwise appropriated" is one term of description, and evidently when the withdrawal was made in 1866 *it was an appropriation of these lands so far as might be necessary for satisfying that particular grant.* It is true it was not a final appropriation or an absolute passage of title to the State or the railway company, for that was contingent upon things thereafter to happen; first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such

deficiencies. Again, in the description are the words "free from preemption or other claims or rights." Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply "free from rights," but "free from claims," and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. (*Northern Pacific Railroad* v. *Sanders*, 166 U. S., 620.) And such is the general rule in respect to railroad land grants.

Again (p. 611):

It may be well in concluding this opinion to again note the fact, already mentioned, that the withdrawal here considered was one in favor of an earlier grant. It may be that a different rule would obtain in case it was in favor of a later grant. *As to place lands, it is settled that, in case of conflict, the title depends on the dates of the grants and not on the times of the filing of the maps of definite location. In other words, the earlier grant has the higher right. No scramble as to the matter of location avails either road*, and it may be that the same thought would operate to uphold the title to the place lands of an earlier as against a withdrawal in favor of a later grant. Neither is it

intended to question the rule that the title to indemnity lands dates from selection and not from the grant. All that we here hold is that when a withdrawal of lands within indemnity limits is made in aid of a earlier land grant and made prior to the filing of the map of definite location by a company having a later grant, the latter having such words of exception and limitation as are found in the grant to the plaintiff, it operates to except the withdrawn lands from the scope of such later grant.

X.

It was not the purpose of Congress, in using the word "granted" in the clause defining the exceptions to the land grant of July 2, 1864, to except from the operation of that grant any portion of the designated lands for the purpose of aiding in the construction of other roads under subsequent grants.

The grant in the third section of the act of July 2, 1864, applies to lands to which—

> The United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

It is claimed that under this exception Congress reserved the right to grant lands covered by the Northern Pacific grant to other railroads, and that under this reservation Congress did make the grant to the Oregon and California. It is only necessary to refer to a few decisions of this court to dispose effectually of this contention.

In *M., K. & T. R. R.* v. *K. P. R. R.* (97 U. S., 491) the court passed upon a controversy between two railway companies for lands in Kansas claimed under conflicting grants. Respecting the character of the exception in the earlier grant, one similar to that under consideration, Mr. Justice Field, speaking for the court, said (bottom p. 498):

> The grant was made in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specially withheld from sale for public uses, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the Government. It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads.

Again, in *St. P. & P. R. R. Co.* v. *N. P. R. R. Co.* (139 U. S., 1), with respect to the very contention made here, that the Northern Pacific grant made an exception in favor of subsequent grants to other roads made prior to its definite location, the court, speaking through Mr. Justice Field, says (bottom p. 17):

> But, independently of this conclusion, we are of the opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself. (*Missouri, Kansas and Texas Railway* v. *Kansas Pacific Railway*, 97 U. S., 491, 498, 499.)

XI.

The grant of 1866 to the Oregon and California applied only to public lands, and can not be held to include land appropriated under the prior grant of 1864 for the benefit of the Northern Pacific.

The Oregon and California grant applies only to "public lands" not mineral. Express exception is made of those sections or parts of sections "found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of." In place of these indemnity lands are to be selected.

The lands in question were not public lands at the time of the Oregon and California grant in 1866, or at the time of the definite location of that road in 1869, because the act of 1864, at both these dates in full force and effect, had set aside and disposed of these lands for the benefit of the Northern Pacific. The Northern Pacific grant of 1864 gave that company the right to locate and construct its "branch," via the valley of the Columbia River, to a point at or near Portland, and so earn these lands granted by the act in aid of such contemplated road. The Oregon and California grant of 1866 did not take away this right granted in 1864 to the Northern Pacific. On the contrary, it was made subject to it. Land not public, but which had been granted or otherwise disposed of, was expressly excepted.

The Oregon and California grant of 1866 never attached to these lands, because at the time of the grant and at the time of the definite location in 1869 the

lands were identified as lands disposed of for the benefit of the Northern Pacific under its grant of 1864.

The act of 1864 itself identified these lands, because they were within the place limits of any road that could be located and built "via the valley of the Columbia River to a point at or near Portland."

They were further identified by the filing of the Perham map of 1865, being within the primary limits of the line designated thereon.

The rule is settled that within common granted or primary limits priority of grant, not priority of location, determines the question of ownership as between railroad companies claiming the same lands under different grants. (*M., K. & T. Ry.* v. *K. P. Ry.*, 97 U. S., 491; *U. S.* v. *Mo., etc., Ry.*, 141 U. S., 358, 369; *U. S.* v. *S. P. R. R. Co.*, 146 U. S., 570, 598, 606; *U. S.* v. *N. P. R. R.*, 152 U. S., 284, 298; *S. P. R. R. Co.* v. *U. S.*, 168 U. S., 1.)

CASES.

Missouri, Kansas and Texas Ry. Co. v. *Kansas Pacific Ry. Co.*, 97 U. S., 491; 1878; Field, J.

Controversy between two railway companies for land in Kansas claimed under grants from the United States.

The grant to the Kansas Pacific was made July 3, 1862, amended July 2, 1864, supplemented July 3, 1866. *Map of general route* was filed prior to December 1, 1866, and in January, 1867, the road was completed for 25 miles, approved by the commissioners, and accepted by the President.

The grant to the Missouri, Kansas and Texas was made July 26, 1866. This grant was accepted by the

company in August, 1866, and in September the line was surveyed and a map of its route prepared; in December, 1866, it was filed in the office of the Secretary of the Interior. In March, 1867, the adjacent lands were withdrawn, and in June, 1870, the line completed and accepted.

Held: That at the time of the grant to the M., K. & T. the title to the land covered by the previous grant to the K. P. had already passed from the United States. The reservations in the K. P. grant did not except from its operations any land for the purpose of afterwards granting it to aid in the construction of any other road.

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> The act of July 1, 1862, passed to the company a present interest in the lands to be designated within the limits there specified. Its language is "that there be and is hereby granted" to it the odd sections mentioned—words which import a grant *in præsenti* and not *in futuro*, or the promise of a grant. Similar terms in other acts of Congress granting lands have uniformly received this interpretation, unless accompanied with clauses restraining their operation. They were so interpreted in *Schulenberg* v. *Harriman*, after full consideration of previous adjudications on their import; and the ruling there was followed in *Leavenworth, Lawrence and Galveston Railroad Co.* v. *United States* (92 U. S., 733). It is true that the route of the road, in this case as in those cases, to aid in the construction of which the act was passed, was to be afterwards designated; and until designated, the title could not attach to any specific tracts. The grant was of sections to be afterwards located, and their location depended upon the route to be established; when that was settled,

the location became certain, and the title that was previously imperfect acquired precision, and attached to the lands.

It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this as in all other cases to the legislative will.

As to the intent of Congress in the grant to the plaintiff there can be no reasonable doubt. It was to aid in the construction of the road by a gift of lands along its route without reservation of rights, except such as were specifically mentioned, the location of the route being left, within certain general limits, to the action of the plaintiff. When the location was made and the sections granted ascertained, the title of the plaintiff took effect by relation as of the date of the act, except as to the reservations mentioned, the act having the same operation upon the sections as if they had been specifically described in it. It is true that the act of 1864 enlarged the grant of 1862, but this was done, not by words of a new and additional grant, but by a change of words in the original act, substituting for those there used words of larger import. This mode was evidently adopted that the grant might be treated as if thus

made originally, and therefore, as against the United States, the title of the plaintiff to the enlarged quantity, with the exceptions stated, must be considered as taking effect equally with the title to the less quantity, as of the date of the first act. (*United States* v. *Burlington and Missouri Railroad Co.*, 4 Dill., 305.)

The construction thus given to the grant in this case is, of course, applicable to all similar Congressional grants, and there is a vast number of them; and it will tend, we think, to prevent controversies between the grantees and those claiming under them respecting the title to the lands covered by their several grants, and put an end to struggles to encroach upon the rights of others by securing an earlier location.

Again, bottom page 498:

The grant was made in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specially withheld from sale for public uses, and tracts having a peculiar character, such as swamp lands, or mineral lands the sale of which was then against the general policy of the Government. It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads.

Bottom page 500:

Upon the principle already announced, in considering the time when the grant to the plaintiff took effect, the title of the defendant to the lands thus set apart to it, had there been no previous disposition or reservation of them, would have become

perfect, and by relation have vested from the date of the act. But so far as the lands were identical with those covered by the previous grant to the plaintiff by the acts of 1862 and 1864, the title could not attach, as it had already passed from the Government.

St. Paul and Pacific Railroad Company v. *Northern Pacific Railroad Company*, 139 U. S., 1; March 2, 1891; Field, J.

Suit to establish the right of the Northern Pacific to land in Minnesota, claimed under the act of July 2, 1864. After quoting the provisions of the first, third, fourth, and sixth sections of the act, Mr. Justice Field says (p. 5):

> As seen by the terms of the third section of the act, the grant is one *in præsenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preemption, or other disposition previous to the time the definite route of the road is fixed. The language of the statute is "that there be, and hereby is, granted" to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.
>
> The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed

one *in præsenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.

This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. (*Schuldenberg* v. *Harriman*, 21 Wall., 44, 60; *Leavenworth, Lawrence, &c., Railroad Co.* v. *United States*, 92 U. S., 733; *Missouri, Kansas, &c., Railway Co.* v. *Kansas Pacific Railway Co.*, 97 U. S., 491; *Railroad Co.* v. *Baldwin*, 103 U. S., 426.) The terms of present grant are in some cases qualified by other portions of the granting act, as in the case of *Rice* v. *Railroad Co.*, (1 Black, 358); but unless qualified they are to receive the interpretation mentioned.

United States v. *Southern Pacific R. R. Co.*, 146 U. S., 570; December 12, 1892; Brewer, J.

On July 27, 1866, Congress granted lands to the Atlantic and Pacific Railroad Company. The grant is one in presenti, with the same limitation contained in the Northern Pacific grant, as follows:

> Whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office.

On March 3, 1871, Congress made a grant to the Southern Pacific Railroad Company.

Under the act of 1866 the Atlantic and Pacific constructed a part of its road, but did no work west of the Colorado River. It did, however, file maps of that

which it claimed to be its line of definite location from the Colorado River to the Pacific Ocean, which, on April 11, and August 15, 1872, were accepted and approved.

On July 6, 1886, Congress passed an act forfeiting certain lands granted to the Atlantic and Pacific, including the lands in controversy.

On April 3, 1871, a month after the grant to the Southern Pacific Railroad Company, that company filed a map of its route and proceeded to construct its road, finishing the same during the year 1878. Its road crossed the line, as located, of the Atlantic and Pacific Company. The lands in controversy are within the grant or place limits of both the Atlantic and Pacific and Southern Pacific at the place where these lines cross.

As the Atlantic and Pacific did not construct its line, and as its rights were subsequently forfeited, and as the Southern Pacific did construct its line, the latter claimed that by virtue of its grant and the construction of its road these lands became its property.

Held: The grant of land made to the Atlantic and Pacific in 1866 and the grant to the Southern Pacific in 1871 were grants *in præsenti* which, when maps of definite location were filed and approved, took effect, by relation, as of the dates of the respective statutes.

Page 592:

> The contention of the Government is that these lands were not included within the grant to the Southern Pacific. Such contention implies no want of good faith on its part. It is not attempting to take back or forfeit that which it has once granted. It is only seeking, a difference of opinion having

arisen, an adjustment, a determination of the extent of its grant. Less than that could not be expected; more than that could not be asked of it.

Page 597:

So the question is whether the filing a map of definite location from the Colorado River through San Buenaventura, to San Francisco, under a claim of right to construct a road the entire distance, is good as a map of definite location from the Colorado River to San Buenaventura, the latter point being the limit of the grant. We think, unquestionably, it is. Though a party claims more than he is legally entitled to, his claim ought not to be rejected for that to which he has a right. The purpose of filing a map of definite location is to enable the Land Department to designate the lands passing under the grant, and when a map of such a line is filed full information is given, and, so far as that line may legally extend, the law perfects the title. It surely can not be that a company must determine at its peril the extent to which its grant may go, or that a mistake in such determination works a forfeiture of all its rights to lands.

Page 597:

Illy as it may accord with the common-law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws as well as grants; that Congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act and to the company having priority of grant, and therefore that in the eye of the law it is now as though there never was a period of time during which any title

to these lands was in the Southern Pacific. Citing *M., K. & T. Rwy.* v. *K. P. Rwy.*, 97 U. S., 491, 497.

Page 606:

The intent of Congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands, and therefore grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands. The question is asked, Supposing the Atlantic and Pacific Company had never located its line west of the Colorado River, would not these lands have passed to the Southern Pacific Company under its grant? Very likely that may be so. The language of the Southern Pacific Company's grant is broad enough to include all land along its line, and if the grant to the Atlantic and Pacific Company had never taken effect, it may be that there is nothing which would interfere with the passage of the title to the Southern Pacific Company.

But that is a matter of result from the happening of something neither intended nor expected. While it may have been within the knowledge of Congress as among the possibilities, that result was not the purpose sought to be accomplished by this legislation. If any other than the general rule as to land grants had been intended, it is to be expected that such intention would have been clearly expressed. So when intent is to be considered, the question is whether Congress intended, the title having once vested in the Atlantic and Pacific, that the Southern Pacific Company should stand waiting to take the lands at some future time, however distant, when the Atlantic and Pacific Company's title should fail.

> Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with the right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they should be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic and Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach and a forfeiture for its own benefit.

United States v. *Northern Pacific R. R. Co.*, 152 U. S., 284; March 5, 1894; Harlan, J.

Action to recover value of lumber made from logs cut in 1886 from public lands in Washington Territory. Submitted on following stipulated facts:

By the act of July 2, 1864, the Northern Pacific Railroad Company was incorporated, with authority to construct a line beginning on Lake Superior, thence westerly by the most eligible route north of the forty-fifth degree of latitude to some point on Puget Sound, "with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than 300 miles from its western terminus." The

act granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 sections per mile, on each side of its line, through the Territories, and 10 sections per mile through the States, upon the conditions stated in the act.

On March 6, 1865, Josiah Perham, president of the road, forwarded to the Secretary of the Interior for filing a map of the general line of the railroad from a point on Lake Superior to a point on Puget Sound via Columbia River, and requested that the granted lands along that route be withdrawn from sale.

By a joint resolution approved April 10, 1869, Congress authorized the Northern Pacific Railroad Company to extend its branch line from a point at or near Portland to some suitable point on Puget Sound, and also to connect the same with its main line west of the Cascade Mountains. The company was not to be entitled to any subsidy or additional lands in respect to such extension, except lands included in the right of way.

On May 4, 1870, Congress made a grant to the Oregon Central Railroad Company, to aid in the construction of a railroad from Portland to Astoria.

On January 31, 1872, the Oregon Central filed its map of definite location.

On May 31, 1870, Congress by a joint resolution authorized the Northern Pacific to mortgage its road and also to locate and construct its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the

Cascade Mountains to Puget Sound. A grant of additional land was included in this resolution.

On August 13, 1870, the Northern Pacific filed another map, showing the general route of its main line from a point on Puget Sound, following almost identically the same route as that indicated on the map filed March 6, 1865; and on August 13, 1870, 20 sections of land per mile on each side of the line were withdrawn from sale for the benefit of the company.

On September 13, 1873, the company filed its map of definite location of the line from Kalama to Tenino, in Washington Territory, a distance of 65 miles. No road has been constructed by the company down the Columbia River. But during the years 1871, 1872, and 1873 it constructed its line from Kalama, on the Columbia River, in a northerly direction to Tenino, forming a portion of a direct line since that time extended and completed to Puget Sound at Tacoma, the western terminus of the Northern Pacific. The road from Tacoma to Portland runs for about one-half of the distance up the valley of the Columbia River to the last-named point.

The land from which the logs were cut lies north of the forty-fifth degree, within 20 miles of the line indicated upon the map filed January 31, 1872, by the Oregon Central, is within 40 miles of the line selected by the Northern Pacific on the main line of its road from Lake Superior to Puget Sound, as indicated upon the Perham map, filed March 6, 1865, as well as of the line selected by it after the passage of the joint resolution of May 31, 1870, as indicated upon the map filed August 13, 1870.

By the act of January 31, 1885, Congress forfeited to the United States and restored to the public domain so much of the lands granted to the Oregon Central as were adjacent to the uncompleted portions of that company's road. The land in question was adjacent to such uncompleted portions.

Held: The act of July 2, 1864, did not contain a grant of lands in aid of the construction by the Northern Pacific of a railroad from Portland to Puget Sound.

The joint resolution of May 31, 1870, was not simply a recognition by Congress of an existing right in the company to locate and construct a road from Portland to Puget Sound, but, on the contrary, should be regarded as giving a subsidy of lands in aid of the construction of the new road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound (p. 298).

> So that the rights of the Oregon Central Railroad Company, whose grant preceded that to the Northern Pacific Railroad Company of May 31, 1870, by nearly two months, attached as of the date of its grant, although the latter company filed a map of general route before the former filed a map of definite location. The lands in question had been disposed of by the United States prior to the passage of the joint resolution of May 31, 1870, namely, by the act of May 4, 1870, granting lands to the Oregon Central Railroad Company in aid of the construction of its road. And as they were embraced by the latter grant, and were not included in any other grant then existing, they were not public lands within the meaning of the grant of May 31, 1870, to the Northern Pacific Railroad Company,

and were, consequently, excepted out of that grant as having been previously disposed of by the United States. (P. 297.)

The lands here in question were disposed of by the United States after the passage of the act of 1864 and before the passage of the joint resolution of May 31, 1870; for they are within 20 miles of the line of the Oregon Central Railroad Company, as shown on its map of definite location, filed January 31, 1872, and based upon the grant to it of May 4, 1870. * * * It is well settled that, in respect to the public lands within at least common granted or primary limits, priority of grant, not priority of location, determines the question of ownership as between parties claiming the same lands under different grants. (*M., K. and T. Ry.* v. *K. P. Ry.*, 97 U. S., 491; *U. S.* v. *Missouri, etc., Ry.*, 141 U. S., 358, 369; *U. S.* v. *S. P. R. R.*, 146 U. S., 570, 598, 606.) (P. 298.)

XII.

The forfeiture of the Northern Pacific grant was not for the benefit of the Oregon and California, but for the benefit of the Government. If these lands were in any way reserved or set aside for the benefit of the Northern Pacific, the act of forfeiture restored them to the public domain.

The act of forfeiture of September 29, 1890 (26 Stats., 426), itself provides (sec. 6) "that no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress," etc.

This provision is in accordance with the general rule that the question whether a grant shall be forfeited or

not is one between the grantor and the grantee. If the grant is forfeited, the forfeiture ordinarily inures to the benefit of the grantor, and not to the benefit of a third party.

In the case of *Van Wyck* v. *Knevals* (106 U. S., 362), Mr. Justice Field, speaking for the court, says (p. 368):

> The right of the company to the remaining odd-numbered sections adjoining the road completed and accepted, not reserved, is equally clear. If the whole of the proposed road has not been completed, any forfeiture consequent thereon can be asserted only by the grantor, the United States, through judicial proceedings or through the action of Congress. (*Schulenberg* v. *Harriman*, 21 Wall., 44.) A third party can not take upon himself to enforce conditions attached to the grant when the Government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the Government has been treated with respect to the property.

In the case of *United States* v. *Southern Pacific Railroad* (146 U. S., 570), Mr. Justice Brewer, speaking for the court, says (bottom p. 606):

> Again, there can be no question, under the authorities heretofore cited that, if the act of forfeiture had not been passed by Congress the Atlantic and Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be re-

stored to the public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic and Pacific was guilty of a breach of the condition subsequent, it elected to enforce a forfeiture for that breach and a forfeiture for its own benefit.

These words, *mutatis mutandis*, apply to the case before the court. But for the forfeiture of 1890 the Northern Pacific could yet construct its road and earn these lands. No power but that of Congress could interfere with this right of the Northern Pacific. Congress has interfered, but it interfered for the benefit of the United States, not for the benefit of the Oregon and California. It restored these lands to the public domain.

In *United States* v. *Northern Pacific R. R. Co.* (152 U. S., 284), Mr. Justice Harlan, speaking for the court, said (p. 298):

> When, therefore, Congress, by the act of 1885, forfeited to the United States and restored to the public domain so much of the lands granted by the act of May 4, 1870, for the benefit of the Oregon Central Railroad Company, as were adjacent to and coterminous with the uncompleted portions of the road, the United States was reinvested with the title for its own benefit exclusively. And the title did not pass to the Northern Pacific Railroad Company by reason of the failure of the Oregon Central Railroad Company to construct its road, or because of the subsequent forfeiture of the latter's rights by the act of 1885. The restoration to the public domain

of the lands so forfeited took from the Northern Pacific Railroad Company no lands granted to it by the act of 1870.

XIII.

The forfeiture act of September 29, 1890, contains convincing proof that Congress believed that the Northern Pacific had acquired title to these lands, because it confirmed to the city of Portland rights conveyed to it by the Northern Pacific in lands forfeited by this act.

The act of forfeiture, in the first section, provides "that there is hereby forfeited to the United States, and the United States hereby resumes the title to, all lands heretofore granted, etc.; and all such lands are declared to be a part of the public domain"

The fifth section provides "that if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the Harrison line, being a line drawn from Wallula, Wash., easterly, etc., all persons who had acquired in good faith the title of the Northern Pacific to such lands prior to July 1, 1885, or at that date were in possession under contract with the company, shall be entitled to purchase such lands from the United States at the rate of $2.50 per acre."

This section contains the proviso "that the right of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company, by deed of August 8, 1886," in a strip of land 50 feet wide (which

is described, and which is a portion of the lands in dispute) "forfeited by this act are hereby confirmed unto the said city of Portland."

XIV.

The forfeiture declared by the act of September 29, 1890, in any event must be held to apply to such of the lands in suit as are within the secondary or indemnity belt of the Oregon and California grant.

Within such belt no title passes until selection of the lands is made by the Secretary of the Interior. This is a familiar rule of construction repeatedly announced by this court (*Ryan* v. *Railroad Co.*, 99 U. S., 382, 386; *St. Paul, etc., R. R.* v. *Winona, etc., R. R.*, 112 U. S., 720, 731; *Sioux City, etc., R. R.* v. *Chicago, etc., R. R.*, 117 U. S., 406, 408; *Barney* v. *Winona, etc., R. R.*, 117 U. S., 228, 232; *Wisconsin Central R. R.* v. *Price County*, 133 U. S., 496).

In the present case, whatever be held to be the effect of the filing of the maps of 1865, it must be clear that these indemnity lands were at least put in reservation by reason of the filing of the maps of August 13, 1870, and so remained until their restoration by reason of the act of forfeiture. Prior to the filing of the map of 1870 no ~~restoration~~ had been made of the lands within said indemnity belt by the Secretary of the Interior, on account of the Oregon and California grant, and the patents, so far as they embraced lands falling within such indemnity belt, issued after the filing of the maps of 1870, were clearly void.

CONCLUSION.

While the decisions of the Secretary of the Interior are not authoritative, yet as to questions involving title to public lands they are entitled to and always have been accorded great respect by the courts. In this connection, therefore, I respectfully call the court's attention to the letter of Secretary Noble to the Commissioner of the General Land Office, dated February 17, 1892. (14 Land Dec. 187, printed in the appendix.) The arguments presented to the court were laid before the Secretary in connection with the protest of the Oregon and California against the decision of the Commissioner of the General Land Office, holding these lands forfeited by the act of September 29, 1890, and were overruled.

The decision of the circuit court of appeals should be reversed and the case remanded, with instructions to affirm the judgment of the circuit court.

JOHN K. RICHARDS,
Solicitor General.

APRIL 3, 1899.

APPENDIX.

ABSTRACT OF OPINIONS OF JUDGES BELOW.

OPINION OF JUDGE GILBERT ON THE DEMURRER (RECORD, PAGES 21 TO 29).

After stating the case, Judge Gilbert first disposes of the contention that the act of July 2, 1864, only granted land in aid of the main line, and not in aid of the branch line via the valley of the Columbia River. He says (bottom p. 23):

> The act authorized the company to build and operate a continuous road, "beginning at Lake Superior and running thence westerly to some point on Puget Sound, with a branch line via the Columbia River Valley to Portland." It then granted to the company permission to take material in the construction of "said road" from the public lands adjacent thereto, and gave a right of way upon public lands two hundred feet "on each side of said railroad." It granted lands in aid of the construction, and the grant extends to lands on each side of "said railroad line," and makes the further provision that as soon as the general route is fixed the President shall cause the granted lands to be surveyed for forty miles on both sides of "the entire line." Throughout the act the reference is to the road with its branches, as a single line or road. In the words of the act, the grant of land is coextensive with the grants of right of way and the grant of other privileges.

The proposition that the lands came within the exception of the Northern Pacific grant as "granted" lands, because of the subsequent grant to the Oregon and California and the definite location thereunder, is next considered and overruled upon the authority of *Missouri, etc., Ry. Co.* v. *Kansas Pacific Ry. Co.*, 97 U. S., 498, and *St. P. & P. R. R. Co.* v. *N. P. R. R. Co.*, 139 U. S., 17.

The court then takes up the effect of the Northern Pacific grant, and the filing of the Perham map, in taking these lands out of the category of public lands subject to the grant of 1866 to the Oregon and California. The ground is taken that the Perham map was a map of general route, and a legislative withdrawal took place upon its filing.

The court holds strongly against the point that the resolution of May 21, 1870, superseded the grant of July 2, 1864. The map of August 13, 1870, is described as "a map of definite location," which in all respects complied with the act. The judge then says (bottom p. 28):

> In the view I take of the law it would make no difference with the rights of the parties to this suit if the Perham map had not been filed. The grant to the Northern Pacific being prior in date to the grant to the Oregon and California, and the reservation of granted lands from the first grant being held not to refer to lands subsequently granted in aid of another road, the first grant remained prior and superior to the second, and there could be no reversal of the order of their priority, resulting either from the fact that the grantee, under the

junior grant, filed its map of definite location and constructed a portion of its road before any map was filed of the line of road under the older grant, or from the further fact that in the final construction of the Northern Pacific road no portion thereof was established upon the line either of the Perham map or the map of 1870. Congress did not offer these lands to the competition of the two companies, and it was not the intention that the more diligent of the two corporations should secure them.

I hold that the failure of the Northern Pacific to construct its road by way of the Columbia River Valley, the forfeiture of its grant therefor declared by Congress in 1890, and the construction by the Oregon and California Company of its road in apt time under its grant of July, 1866, are all matters foreign to the question under consideration. The fact remains that the lands in controversy were granted lands at the time the grant to the Oregon and California Company took effect. They were, therefore, not the subject of the grant to that company. When that grant was made the beneficiary thereof had full notice of the prior grant, and had reason to understand that the lands so devoted to aid the construction of the other road were not within the purview of its own grant, and were not promised it by the United States.

OPINION OF JUDGE GILBERT ON THE MERITS (RECORD, PP. 63-69).

After stating that upon the proofs it had been shown that the map of August 13, 1870, was not a map of definite location, but of general route, the court considers the contention that the lands were never taken from the public domain by the grant to the Northern Pacific, for

the reason that there was no definite location, and therefore no title ever vested. The court describes the character of the valley of the Columbia River, along which the branch line, described in the grant of 1864, was to be constructed, saying (Record, bottom p. 64):

> It is evident, however, that the valley of the Columbia River, for a large portion of the route which would necessarily be covered by such a branch line, is so narrow that the road must have followed either the north or the south bank of the river, and it will not be disputed that a road built in compliance with the terms of the grant, and on the line therein defined, would have been confined to a narrow strip of territory.

The view is taken that it is not necessary that the title pass in order that the lands be segregated from the public domain and excepted from the operation of the junior grant.

> It was such segregation to set apart a larger area within which the lands granted to the Northern Pacific Company were to be selected by it. (Record, p. 65; citing *Bardon* v. *N. P. R. R. Co.*, 145 U. S., 538; *Wilcox* v. *Jackson*, 13 Pet., 513; *Core* v. *Quigley*, 149 U. S., 652; *Newhall* v. *Sanger*, 92 U. S., 761; *U. S.* v. *McLaughlin*, 127 U. S., 449.)

The case of *Core* v. *Quigley* is distinguished upon the ground that there the Government had the right of selection, here the railroad company, the Northern Pacific.

> The United States had not the right to locate the lands granted to aid the Northern Pacific Railroad Company. The grant to that company carried to the grantee the right to make selection of the granted lands. It might definitely locate its line

> in good faith, in compliance with the requirement of the act, and by such location select and acquire the lands within the place limits upon both sides of its line. It is unimportant that the company never exercised this power. The right was established by the act and it still subsisted when Congress, by a later grant, bestowed lands in aid of the construction of the Oregon and California Railroad. (Record, p. 67.)

The court again discusses and upholds the sufficiency of the Perham map as a map of general route by the filing of which a legislative withdrawal took place. Upon the point that the Perham map was defective because the line down the Columbia Valley was extended to Puget Sound, and thus appeared to be a main line instead of a branch, the court says (bottom p. 68):

> So far as the map locates the road west of the Rocky Mountains, it complies strictly with the terms of the act, with the exception that the line by the Columbia River Valley, instead of ending at a point at or near Portland, proceeds farther and ends at the waters of Puget Sound. The fact that the construction of a road from Portland to Puget Sound was not authorized by the grant does not impair the validity of the location of that part of the road which was authorized and which was located in compliance with its terms; and it is immaterial that the main line and the branch line are not so respectively designated upon the map. They are in the location called for by the language of the granting act, and it will be presumed that they are located in pursuance thereof. This map had been on file for more than a year when the grant to the Oregon and California Railroad was made, and it not only furnishes evidence of the location of the general route

of the line of the Northern Pacific branch line, and of the consequent segregation of those lands from the public lands by operation of law, but it was notice to the Oregon and California Railroad Company of the prior grant and the prior bestowal of these lands in aid of another road.

In conclusion, the court calls attention to the fact that if the map of 1865 was ineffective to accomplish the withdrawal, the map of 1870 was open to no such objection. Upon it an actual withdrawal was made. This sufficiently identified the lands covered by the Northern Pacific grant of 1864. It was true that the Northern Pacific still retained the right to change its line, "but until such final map was filed, the map of general route, whereby the withdrawal was in fact accomplished, served to sufficiently identify the granted lands, notwithstanding the reserved right to alter its location. In the absence of such map of final location, and until the same is filed, it is a reasonable presumption that the granted lands are those which have been withdrawn in pursuance of the filings of the map of general route, as required under the terms of the grant."

MAJORITY OPINION OF ROSS, C. J., AND HAWLEY, D. J. (RECORD, PP. 168–175).

After a statement of the case, in the course of which (Record, p. 170) Judge Ross states that the rejection of the Perham map was "acquiesced in" by the Northern Pacific, he concedes (Record, p. 172) that the forfeiture of 1890 was for the benefit of the Government alone, and then states the real question, namely, "Did the lands in

question ever become affected by any grant to the Northern Pacific Railroad Company?"

The map of August 13, 1870, is treated as having no bearing whatever upon the case, because it was filed under the resolution of 1870, which contained a new grant, and did not embrace any public land disposed of after the grant of July 2, 1864. After this summary disposition of an important branch of the case, the court says that the only thing which could take the lands out of the mass of public land to which the Oregon and California grant applied was the grant of July 2, 1864, and the Perham map filed thereunder.

The Perham map is held ineffective because it purports to designate a route from Lake Superior, via the valley of the Columbia, to Puget Sound—a line not authorized by the grant—and because it was too indefinite, being for that reason rejected by the Land Department.

The Perham map having no effect, these lands remained public lands, subject to the Oregon and California grant, unless the Northern Pacific grant of 1864 in itself operated to withdraw them. This can not be maintained without holding that all the immense belt north of the forty-fifth degree of latitude was withdrawn by the Northern Pacific grant of 1864. Moreover, the very grant of July 2, 1864, in express terms declared that it embraced only public land not granted or otherwise appropriated and free from all claims "at the time its line of road was definitely fixed and a plat thereof filed." Until the grantee thus identifies the lands embraced by the grant there is nothing to segregate any particular land from

the mass of public lands. Under the circumstances the Northern Pacific grant of 1864 never took effect so far as these lands are concerned, and so they remained public lands at the time of the Oregon and California grant.

DISSENTING OPINION OF MR. JUSTICE McKENNA, THEN SITTING AS C. J. (RECORD, pp. 176–183).

The contention that the grant to the Oregon and California is within the reservations of the grant to the Northern Pacific is disposed of adversely upon the authority of *M., K. & T. Ry.* v. *K. P. Ry.*, 97 U. S., 491, and *St. P. & P. R. R. Co.* v. *N. P. R. R. Co.*, 139 U. S., 1, the case of *U. S.* v. *N. P. R. R. Co.*, 152 U. S., 284, being distinguished.

What is regarded as the real question is then discussed, namely, "Did the grant to the Northern Pacific Company by the act of 1864 amount to such an appropriation of the lands in controversy as to preclude them from the operation of the grant to the Oregon and California road by the act of 1866?" This is done without regard to the Perham map or the map of August 13, 1870, the view being expressed that these maps have no bearing upon the question to be determined. The principles to be followed in deciding between conflicting railroad land grands are thus broadly stated (Record, top p. 179):

> Many phases of railroad land-grant cases have been presented to the Supreme Court and have been so firmly established as to become postulates. These are that grants of that kind are grants in praesenti in the nature of a float; that they do not attach to specific sections until identification by a map of definite location of the road; that within what has been called

> "common granted or primary limits" the date of the grant is the determinative fact in contending railroad grants, not the date of location, giving, if prior, priority of right; if, at the same time, equality of right—that is, giving the land in equal undivided moieties—in neither case can an advantage be secured by priority of location or of construction; that the condition of building the road is a condition subsequent, and right and grant continuing until forfeiture by or entry by the United States, and that the forfeiture or entry, in the absence of explicit legislative declaration, is for the benefit of the United States, not for the benefit of the subsequent grantees.

The suggestion by the majority that the application of these principles would result in the withdrawal under the Northern Pacific grant of 1864 of all lands north of the forty-fifth degree of latitude is not regarded as embarrassing. (Record, middle p. 179):

> To what is it embarrassing? To settlers? To the occupation and development of the country under the land laws? Not at all. This is prevented by the reservations in the grant. To other railroad companies? Grants to these was not a constant but an occasional policy, and dependent so much upon special circumstances as to require (certainly not necessarily to exclude) a right of selection of route in a wide territory. If this was to be primarily guarded against or to be afterwards corrected, the remedy was in Congress, and obvious.

Attention is called to the fact, however, that it does not follow that all these lands would be withdrawn. The grant indicates a route within its limits. What this court said in *U. S.* v. *N. P. R. R. Co.* (152 U. S.), is

quoted. The rights conferred by a railroad grant are thus clearly defined (Record, middle p. 180):

> I have said, as to contesting railroad grants, we do not regard maps, either of general route or of definite location, but only the date of the grants and the rights conveyed by them. What rights are conveyed by them? There are two, one ultimate and the other provisional. The ultimate one gives a title to a certain number (twenty in the Territories, ten in the States) of specified sections. The provisional gives a power of selection of these from a wider extent of territory. Is it not a substantial and necessary right? May it exist in fullness and with power to exercise in two railroad companies at the same time? Manifestly not. May it exist in them in succession, or, rather, suspended in one until default in the other? If so, when comes default, and how?

Mr. Justice McKenna then comments upon the case of the *United States* v. *Southern Pacific Railroad* (146 U. S., 590), dwelling specially on the following language of the court (Record, bottom p. 181, p. 183):

> Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and constructing it, its title to these lands would have become perfected. No power but that of Congress could interfere with the right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent.

The impossibility of recognizing the right of the Oregon and California to these lands without violating

the right of the Northern Pacific, under the act of 1864, to locate its road and acquire these lands is thus forcibly stated (Record, bottom p. 182):

> By what, then, did it (the Oregon and California) get rights, and when? Only by its grant, if at all. But at the date of that the right of locating its road so as to take the lands in controversy existed unimpaired in the Northern Pacific Company under the prior grant of 1864, and continued to exist and did exist unimpaired in that company January 29, 1870, when the Oregon and California Company filed its map of definite location; did exist when that company built its road; did exist in 1871 and 1877, when patents were issued to that company. If not, by what was it taken away? Certainly not by any act of the United States, and the United States alone had the power. No act of the Oregon and California Company could do it.

SECRETARY NOBLE TO THE COMMISSIONER OF THE GENERAL LAND OFFICE, FEBRUARY 17, 1892.

I have considered the protest filed on behalf of the Oregon and California Railroad Company, against so much of the instructions issued by your office, under the forfeiture act of September 29, 1890 (26 Stat., 496), as relates to the lands falling within the conflict, or overlap, of the grants for the Northern Pacific and Oregon and California Railroad Companies, east of Portland, Oregon.

By the act of Congress approved July 2, 1864 (13 Stat., 365), a grant was made to the Northern Pacific Railroad Company, to aid in the construction of a railroad from a point on Lake Superior, in the State of Minnesota, or Wisconsin, westwardly by the most eligible route, to be determined by the company, on a line north of the 45th degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia River, to some point at or near Portland, in the State of Oregon.

The joint resolution of May 31, 1870 (16 Stat., 378), authorized the company to locate and construct "its main line to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound."

It will be seen that the effect of said resolution was to change the branch to main line, and *vice versa*, and also to provide for a land grant for the new line, viz, a connecting piece between Portland, Oregon, and Puget Sound.

The location of the road, as shown upon the map of general route filed and accepted August 13, 1870, follows

the Columbia River from Wallula, Washington, to a point on the north side of the river just opposite to Portland, Oregon. Between Wallula, Washington, and Portland, Oregon, the road was not constructed, and hence comes within the terms of the first section of the forfeiture act, before referred to, which provides:

"That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and conterminous with the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain: *Provided*, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted."

The protestant claims under the act of Congress approved July 25, 1866 (14 Stat., 239), which provided for the building of a road from Portland, Oregon, to the south boundary of Oregon to connect with the California and Oregon Railroad, and made a grant of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad." It further provided:

"and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands designated as aforesaid shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections."

The Oregon and California Railroad Company filed a map of definite location of its road opposite this land

October 29, 1869, which was accepted by this Department January 29, 1870, upon which withdrawal was ordered, and the road was duly built opposite these lands within the time limited by law for the construction of the road.

Under the rulings in force in the administration of land grants, in this Department, prior to 1878, it was held that priority of location gave priority of right to lands within conflicting limits, and a large number of tracts were patented to the Oregon and California Railroad Company, within the conflict now under consideration.

In your instructions to the register and receiver at Oregon City, Oregon, dated January 19, 1891 (not reported), under the forfeiture act, it was held by you that, east of Portland, Oregon, the grant for the Northern Pacific Railroad Company is under the act of July 2, 1864 (*supra*), which being prior to the act making the grant for the Oregon and California Railroad Company, it follows that the lands embraced within the withdrawal under the 6th section of the act of 1864 were excepted from the latter grant, and by the forfeiture act said lands were restored to the public domain.

The principal grounds on which the protest on behalf of the Oregon and California Railroad Company is based are as follows:

"The Northern Pacific received its authority of law to locate its main line to Portland by the joint resolution of 31st May, 1870, and filed a map of general route 13th August, 1870. It never made a definite location opposite this place where the conflict under discussion exists, and though in the general sense of the forfeiture act of 1890 that company had a grant of lands on that general route, that grant not having been definitely located, it could not now be held that it ever took effect by relation as of the date of the grant, whether the date of the grant be July 2, 1864, or May 31, 1870."

It is further claimed that the joint resolution of 1870 was substantially a new grant of lands within limits to

the extent mentioned in the charter of the company, and excepted therefrom lands included in grants made subsequent to July 2, 1864, and prior to the definite location of the road.

As stated by the company, "The Northern Pacific Company was thus provided with indemnity therefor, if it lost lands because of the grant to the Oregon and California Company which Congress intended to recognize."

It is first necessary to determine which is the prior grant within the conflict referred to, for within conflicting limits neither priority of location nor priority of construction gives priority of right, but in each case the respective rights are determined as of the dates of the acts making the grants. *Missouri, Kansas and Texas Railroad Company* v. *Kansas Pacific Railroad Company*, 97 U. S., 491; *St. Paul and Sioux City R. R. Co.* v. *Winona and St. Peter R. R. Co.*, 112 U. S., 720. It is true that in these cases the roads had been definitely located, but it would seem that the reasoning in said cases applies with equal force to the matter under consideration.

It will be remembered that the act of July 2, 1864 (*supra*), provided for the construction by the Northern Pacific Railway Company of a branch line via the valley of the Columbia River to some point at or near Portland, Oregon.

In March, 1865, the president of said company filed in this Department a map of general route of the entire line of the road, showing a location down the Columbia River to a point opposite Portland, and thence north to Puget Sound, and asked that a withdrawal be ordered thereon, which was refused, the same being deemed insufficient.

As held by Attorney-General Garland, in his opinion of January 17, 1888 (8 L. D., 14), "the map thus filed accomplished no good purpose for the company, but afforded the public a general knowledge of probable location of the prospective road."

This was the condition of affairs at the date of the passage of the act of 1866, making the grant for the Oregon and California Company.

The act of 1864 made the location of the grant therein provided for, in this vicinity, reasonably certain, and the location of 1865 imparted additional information upon the subject.

The joint resolution of 1870 merely changed the name of this part of the line, by designating it as the main line, instead of the branch line, but the grant remained under the act of 1864, and the map of general route filed in August, 1870, being accepted by this Department, withdrew the lands under the 6th section of the act of 1864. The section provides:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required in the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act."

It is true that the Northern Pacific Railroad was never definitely located opposite this land, but in view of the requirement in both acts prescribing that the road was to be built *via* the valley of the Columbia River, and of the provision in the sixth section of the act of 1864, that the general route shall be fixed, it would seem that the location of 1870 fixed this grant as against the location upon any other grant subsequent in date to the act of 1864.

In the forfeiture act special provision was made for the disposition of the forfeited lands lying south of the present terminal at Wallula, Washington, and north of what is known as the "Harrison line." When it is remembered that these lands are opposite that portion of the road not definitely located, it is apparent that Congress treated the lands embraced in the withdrawal on general

route for this road as "granted lands," within the meaning of the forfeiture act.

As against the holding of your office, that a moiety of the lands within the conflict, or overlap, of the grants for the main and branch lines of the Northern Pacific Railroad, opposite the unconstructed portion of the main line was forfeited by the act of September 29, 1890 (*supra*, the Northern Pacific Railroad Company urged that the main line had not been definitely located between Wallula and Portland.

In answer to this contention it was held (11 L. D., 625):

"In the first place, there was a grant along said route which lacked only action on the part of the company to consummate. Furthermore, a reading of the entire act leaves no room to doubt that a forfeiture along said stretch of the main line was contemplated, and the lands so forfeited are described in the first section of the act as 'granted lands.'"

This applies with equal force in the present controversy, and having determined that the grant for the Northern Pacific Railroad Company, east of Portland, Oregon, is under the act of July 2, 1864 (*supra*), the forfeiture declared by the act of September 29, 1890 (*supra*), is to the extent of the withdrawal made under the 6th section of the act of 1864.

It but remains to consider the question as to whether the exception clause in the act making the Northern Pacific grant included grants to aid in the construction of other roads, made subsequent to the passage of said act and prior to the definite location of the road.

This question was considered by the Supreme Court in the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., 1), and therein it was held,

"We are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Com-

pany was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself. Missouri, Kansas and Texas Railway *v.* Kansas Pacific Railway (97 U. S., 491, 498, 499)."

It is clear, had the Northern Pacific Railroad been constructed through this conflict, its right would have been superior to that of the Oregon and California Railroad Company; hence, any claim the latter company may assert in and to these lands must rest upon the act declaring the forfeiture.

The 6th section of that act provides:

"That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided."

I can find no provision in the act under which the Oregon and California Railroad Company would be entitled to these lands, but, on the contrary, the 5th section of the act provides:

"That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the legislative assembly of the State of Oregon approved November twenty-fifth, eighteen hundred and eighty-five, providing for the means to supply the city of Portland with an abundance of good, pure,

and wholesome water over and across the following-described tracts of land: Sections nineteen and thirty-one, in township one south, of range six east; sections twenty-five, thirty-one, thirty-three, and thirty-five, in township one south, of range five east; sections three and five in township two south, of range five east; section one in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five, in township one south, of range four east, of the Willamette meridian in the State of Oregon, forfeited by this act, are hereby confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore described strip of land, over and across the above-described sections for the purpose of constructing, maintaining, and repairing a water-pipe line aforesaid."

This pipe line traverses the entire conflict, and had Congress recognized any rights in the Oregon and California Railroad Company, within the conflict, the above provision would not only have been unnecessary, but in conflict with the rights of said company.

From a review of the entire matter, I can see no error in your instructions, and the same will be carried into effect, if heretofore suspended, and as to all lands patented to the Oregon and California Railroad Company, within the conflict, steps should be taken at once looking to their recovery as provided for in the act of March 3, 1887 (24 Stat., 556).

O